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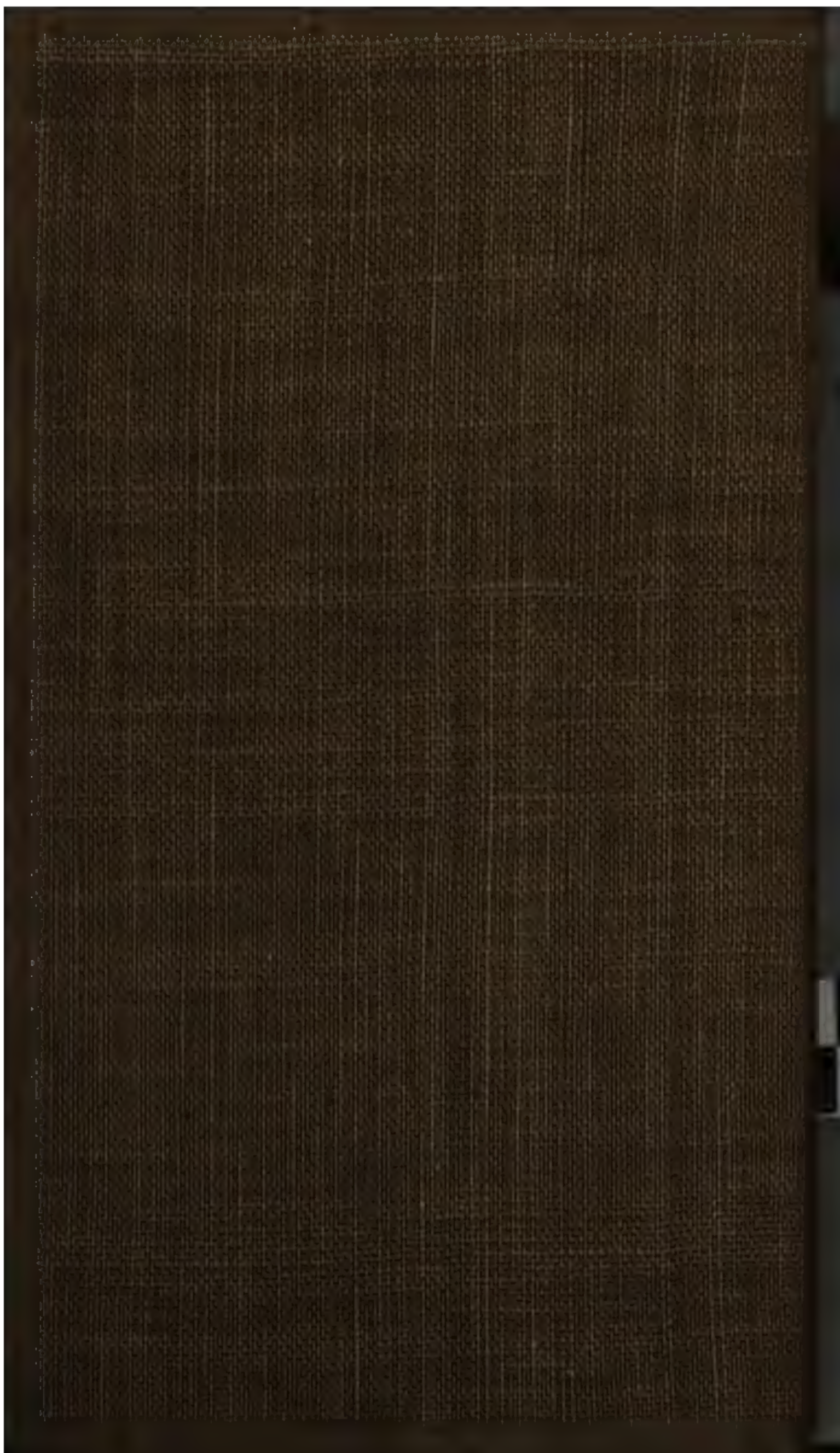
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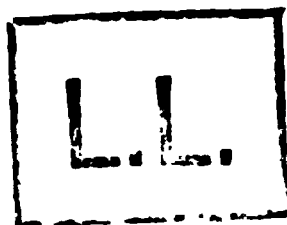
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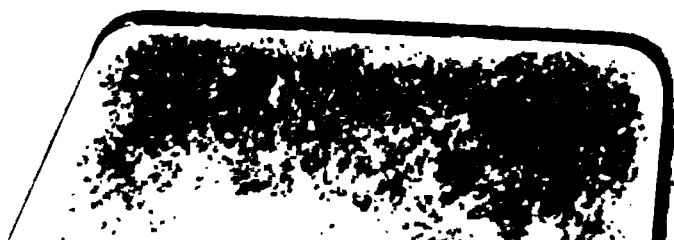


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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF NEVADA,

DURING THE YEAR 1871.

REPORTED BY

ALFRED HELM, CLERK OF SUPREME COURT,

AND

THEODORE H. HITTELL, Esq.

VOLUME VII.

SAN FRANCISCO:

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1872.



Justices of the Supreme Court.

HON. J. F. LEWIS,.....CHIEF JUSTICE.

HON. B. C. WHITMAN, }
HON. JOHN GARBER, }ASSOCIATE JUSTICES.

Officers of the Court.

HON. L. A. BUCKNER,.....ATTORNEY GENERAL.

ALFRED HELM,.....CLERK.

S. T. SWIFT,.....BAILIFF.

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Second District	HON. C. N. HARRIS.
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Fifth District	HON. BENJ. CURLER.
Sixth District	HON. D. C. MCKINNEY.
Seventh District	HON. MORTIMER FULLER.
Eighth District	HON. WM. H. BEATTY.
Ninth District	HON. J. H. FLACK.

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RULE IV.

On such motion, there shall be presented the certificate of the Clerk below, under the seal of the Court, certifying the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears, the fact and date of the filing the undertaking on appeal, and that the same is in due form ; the fact and time of the settlement of the statement, if there be one ; and also, that the appellant has received a duly certified transcript or that he has not requested the Clerk to certify to a correct transcript of the record ; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

RULE V.

All transcripts of records hereafter sent to this Court shall be on paper of uniform size, according to a sample to be furnished by the Clerk of the Court, with a blank margin one and half inches wide at the top, bottom, and side of each page ; and the pleadings, proceedings, and statement shall be chronologically arranged. The pages of the transcript shall be numbered, and shall be written only upon one side of the leaves. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order, or proceeding, and of the testimony of each witness, and shall have, at least, one blank or fly-sheet cover.

Marginal notes of each separate paper, order, or proceeding, and of the testimony of each witness, shall be made throughout the transcript.

The transcript shall be fastened together on the left side of the pages, by ribbon or tape, so that the same may be secured, and every part conveniently read.

The transcript shall be written in a fair, legible hand, and each paper or order shall be separately inserted.

RULE VI.

No record which fails to conform to these rules shall be received or filed by the Clerk of the Court.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the Court below, either party may suggest the same, in writing, to this Court, and upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record, as may be required. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing and filed at least one day before the argument, or they will not be regarded. In such cases, the objection must be presented to the Court before the argument on its merits.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, to the Court on the part of such representative or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE X.

The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; *provided*, that all cases in which the appeal is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

RULE XI.

Causes from the same Judicial District shall be placed together, and all the causes shall be set on the calendar in the order of the several districts, commencing with the first, except that causes in which the people of the State are a party shall be placed at the head of the calendar.

RULE XII.

At least three days before the argument, the appellant shall furnish to the respondent a copy of his points and citation of authorities; and within two days thereafter, the respondent shall furnish to the appellant a copy of his points and citation of authorities, and each shall file with the Clerk a copy of his own for each of the Justices of the Court, or may one day before the argument file the same with the Clerk, who shall make such copies, and may tax his fees for the same in his bill of costs.

RULE XIII.

No more than two counsel on a side will be heard upon the argument, except by special permission of the Court; but each defendant who has appeared separately in the Court below may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument.

RULE XIV.

All opinions delivered by the Court, after having been finally corrected, shall be recorded by the Clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, presented within ten days after the final judgment is rendered, or order made by the Court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate to the Court below shall be issued until the expiration of the ten days herein provided, and decision upon the petition, unless upon good cause shown, and upon notice to the other party, or by written consent of the parties, filed with the Clerk.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the Court below.

RULE XVII.

No paper shall be taken from the court-room or Clerk's office, except by order of the Court, or of one of the Justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the Clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the Court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the Clerk of the Court below, and upon giving notice thereof to the opposite party or his attorney, and to the Sheriff, it shall operate as a supersedeas. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this Court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree, which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each forty miles, or fraction of forty miles, from Carson.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEVADA,
APRIL TERM, 1871.

GUY THORPE v. JERRY SCHOOLING.

STATE STAMP DUTIES. The schedule of stamp duties adopted in 1871 as part of the amendment to Section 126 of the general revenue act (Stats. 1871, 142) supersedes and abrogates all others, and is the only one in force.

REPEAL OF STAMP DUTY SCHEDULE OF 1866. The schedule of stamp duties contained in the Act of 1866, (Stats. 1866, 177) was entirely repealed by the operation of the new Act of 1871, (Stats. 1871, 142) though not expressly referred to therein.

CONSTRUCTION OF STATUTES—LEGISLATIVE INTENT. The intention of the legislature controls the courts, not only in the construction of an act, but also in determining whether a former law is repealed or not; and when such intention is manifest it is to be carried out, no matter how awkwardly expressed or indicated.

REPEAL OF STATUTE BY REVISION OF SUBJECT MATTER. A new statute, revising the whole subject matter of a former law, repeals it, though containing no express words to that effect.

NO STAMPS TO BANK CHECKS. State stamp duties on bank checks were abrogated by operation of the Act of March 4th, 1871.

This was an application to the Supreme Court for a writ of mandamus requiring Schooling, as treasurer of state, to furnish, on

Thorpe v. Schooling.

tender of the price, six stamped bank checks, issued under the state revenue Act of 1865, and in accordance with the schedule of stamp duties therein contained, as amended in 1866. The Treasurer declined and refused to furnish, on the ground that the Act of March 4th, 1871, (Stats. 1871, 142) amending the revenue laws, repealed that portion of them which had required the sale or affixing of a state revenue stamp to a bank check.

A. C. Ellis, for Relator.

L. A. Buckner, Attorney General, for Defendant.

By the Court, LEWIS, C. J. :

The question to be determined in this case is, whether an amendment of certain sections of the revenue Act of 1865, and the adoption of a new schedule of stamp duties, operate as a repeal of the old schedule ; or whether both are to be upheld, so far as they do not directly conflict with each other. The question is raised by this state of facts : In the year 1865, the legislature enacted a general revenue law, among the various divisions of which was one entitled " Stamp Tax," the first section of which was Section 126 of the act, and reads thus : " On and after the first Monday of May, in the year of our Lord one thousand eight hundred and sixty-five, there shall be levied, collected, and paid, in gold coin of the United States, or in foreign coin, at the valuation fixed by the laws of the United States, for and in respect of the several instruments, matters and things mentioned and described in the schedule hereunto annexed, or for and in respect of the vellum, parchment, or paper upon which such instrument, matters or things, or any of them, shall be written or printed, by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several duties or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in said schedule."

Following Section 139 of the act, (which is the last section touching stamp duties) comes a division entitled " Schedule Stamp Duty." In the year 1866, this last section was amended ; and with it, as if it were a part of that section, the schedule was also

amended in some particulars. In the present year (A. D. 1871) the legislature amended several sections of the general law of 1865—among others, Section 126, above quoted—making, however, no material alteration, except that a new schedule of stamp duties is attached to and made a part of it. In this last act, no reference whatever is made to the schedule which had been adopted apparently as a part of Section 139 by the amendments of 1866. The schedule last adopted is substantially like that of 1866. Some few matters formerly requiring stamps are omitted, and the arrangement is somewhat different. However, on the whole there is but little change.

The question thus presents itself, whether the schedule last adopted and made a part of Section 126 supersedes that of 1866, or whether both are to be maintained so far as they do not conflict.

Our conclusion is, that the last schedule abrogates all others, and is the only one now in force. We are conducted to this result in this wise: The intention of the legislature controls the courts, not only in the construction of an act, but also in determining whether a former law is repealed or not. Whatever that body manifestly intended is to be received by the courts as having been done by it, provided it has in some manner, no matter how awkwardly, indicated or expressed that intention.

If therefore, it be clearly apparent that it intended to abrogate a former law, no matter whether that intimation be expressly stated or not, it must be carried out. This is in no manner adverse to the rule always acted on, that the later statute does not by implication repeal a former touching the same subject matter, where they can both be supported. If there be a repugnancy between them so that both cannot be enforced, it is presumed the legislature intended that the last act should prevail, that being the last expression of its will; and that by passing an act altogether repugnant to one already existing, it intended to repeal the former. So it is the intention of the legislature which controls in such cases, the repugnancy being the means only whereby it is ascertained. But the intention ascertained by any other means is equally cogent in controlling the courts. True, repeals by implication are not favored; and if it be not perfectly manifest, either by

irreconcilable repugnancy, or by some other means equally indicating the legislative intention to abrogate a former law, both must be maintained. The intention, if perfectly clear, however, must control, however it may be expressed or manifested. It is upon this principle, evidently, that it is held that a statute revising the whole subject matter of a former law repeals it. So it was held in the case of *Bartlett et als. v. King, Executor*, 12 Mass. 537. In that case, an exceedingly useful statute, passed in 1754, concerning donations and bequests to pious and charitable uses, was held repealed by an act passed in 1785 upon the same subject matter; which, however, omitted to reenact some of its provisions. "A subsequent statute," said Dewey, J., "revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former."

Can there be any doubt whatever, upon an inspection of the laws under consideration, that the legislature of Nevada intended to abrogate all former schedules, and to make that adopted by it in 1871 the only one thereafter to be in force? Clearly not. Here the whole subject matter of the former schedules is legislated upon in that adopted in 1871. And furthermore, can it be supposed that the legislature intended to have two schedules of stamp duties in the same act, one embracing nearly everything embodied in the other? We cannot persuade ourselves that anything so manifestly useless and absurd was intended; and if not, then it must be held that the last schedule was intended to abrogate or take the place of all former ones.

Again, Section 126 is the only provision of law that we have been able to find which directly imposes the stamp duties enumerated in the schedule. But that section, as amended in 1871, only imposes such duties upon the several instruments, matters and things mentioned and described in the schedule thereunto annexed; and then follows the schedule as amended, forming a part of the section itself. Now, what is more obvious than that stamp duties are imposed only on the instruments mentioned in the schedule attached to or made a part of that section? Only one schedule is

Torreyson v. The Board of Examiners of the State of Nevada.

mentioned—the word is not employed in the plural number. The question then arises, which schedule is referred to; that of 1866, or the one adopted as amended in 1871? Unquestionably, the latter. If so, then there is no law whatever imposing stamp duties on any instruments except those mentioned in the latter schedule.

We are satisfied the legislature intended that the schedule last adopted should supersede all previous ones. Upon well settled rules of construction, therefore, that intention must prevail, and control the courts.

The writ must be denied. It is so ordered.

GARBER, J., did not participate in the foregoing decision.

WILLIAM D. TORREYSON *v.* THE BOARD OF EXAMINERS OF THE STATE OF NEVADA.

CLAIMS FOR OUTSTANDING STATE CAPITOL INDEBTEDNESS. Where a claim was duly presented under the Act of 1871, providing for payment of outstanding indebtedness incurred in constructing the state capitol, (Stats. 1871, 154): *Held*, that the State Examiners could not be required to examine or pass upon such claim until the completion and acceptance of the capitol.

CONSTRUCTION OF STATUTES RELATING TO INDEBTEDNESS FOR STATE CAPITOL. The Act of 1871 relating to outstanding indebtedness for construction of the state capitol, (Stats. 1871, 154) must be read in connection with the Act of 1869, providing for its erection, (Stats. 1869, 73); and taking the two together, as no claim could be allowed or warrant drawn upon the \$100,000 fund until completion and acceptance of the capitol, so also no indebtedness could be incurred.

STATUTORY CONSTRUCTION—TITLE OF ACT. The title of a statute may be considered for the purposes of construction, and especially so when the title is referred to in the body of the act.

ALL PARTS OF STATUTES TO BE GIVEN EFFECT IF POSSIBLE. No part of a statute should be rendered nugatory, nor any language be turned to mere surplusage, if such consequences can properly be avoided.

APPLICATION to the Supreme Court for a writ of mandamus to compel the State Board of Examiners to take action upon a claim presented by relator Torreyson. The affidavit set forth that relator's claim was a bona fide one of \$901.34 against Peter Cav-

Torreyson v. The Board of Examiners of the State of Nevada.

anough, for labor and material performed and used in the construction of the state capitol; that the appropriation of \$100,000 made by the Act of February 23d, 1869, for the erection of the capitol had been fully exhausted; that relator had presented the claim to the board in accordance with the provisions of the Act of March 6th, 1871, referred to in the opinion; that the board refused to act upon it for the reason that the capitol building was not completed and had not been accepted; and praying for a writ commanding the board to take action.

The board in its response set forth that the appropriation of \$100,000 had not been allowed by it; that until such allowance no jurisdiction vested in it to hear and determine the alleged claim of relator; that it had not satisfied itself that all the moneys paid from the state treasury to Peter Cavanaugh, or others for him, for the construction of the capitol, had been actually used in such construction, and that such determination by it was a condition precedent to its action upon claims presented under the Act of 1871.

A. C. Ellis and *R. M. Clarke*, for Relator.

L. A. Buckner, Attorney General, for Defendants.

By the Court, WHITMAN J.:

At the session of 1869, the legislature of the State of Nevada passed an act entitled "An Act to provide for the erection of a state capitol at Carson City." In this Act are Sections 3 and 10, as follows:

"SECTION 3. The entire cost of said building when completed, (excluding the material furnished, as provided in Section 2 of this act) shall not exceed one hundred thousand dollars."

"SECTION 10. In letting contracts said Board shall not obligate the state to pay, nor shall the Board of State Examiners allow, to any contractor, at any time prior to the completion of his contract and its acceptance by said Board, more than seventy-five per cent. of the value of materials then furnished, or work then done; and upon completion and acceptance said Board of Commissioners may agree to pay, and said Board of Examiners may allow, the balance due on said contract."

Torreyson v. The Board of Examiners of the State of Nevada.

At the session of 1871, an act was passed, entitled "An Act to provide for the payment of outstanding and unsatisfied claims for labor performed, money or material furnished, services rendered, and necessary expenses incurred in and about the construction and completion of the state capitol at Carson City," in which are Sections 2, 3 and 4, as follows:

"SECTION 2. Any person having an unsatisfied *bona fide* claim against Peter Cavanaugh for labor actually performed, money or material actually furnished, services rendered, or expenses necessarily incurred for and actually used in the construction or completion of the state capitol at Carson, which claim has not been paid or secured, either in whole or in part, by warrants or orders for warrants, upon the treasury, shall present the same to the State Board of Examiners, within thirty days after the passage of this act, itemized and duly verified, for their action as provided by law. * * * * *

"SECTION 3. If, upon examination, the Board of Examiners are satisfied that the labor was actually performed or the material actually furnished, or the expenses necessarily incurred in the construction of said state capitol, and that all the money heretofore paid from the state treasury to said Cavanaugh, or others, for the construction of said state capitol, has been actually used for that purpose, and that no part of the claim has been paid, or secured to be paid, they shall allow the same, or so much thereof as they shall deem proper and just; and certify the claim with their approval to the controller of state, who shall thereupon draw his warrant upon the state treasurer for the amount so allowed, in favor of the party owning or holding such claim."

"SECTION 4. No claim shall be allowed by the Board of Examiners against the fund created by this act, nor shall the Controller draw any warrant against the same, until the appropriation of one hundred thousand dollars, created by Act of February 23d, 1869, entitled 'An Act to provide for the erection of a state capitol at Carson City,' shall have been fully exhausted by indebtedness incurred, claims allowed, or warrants drawn against the same."

The applicant brings himself under the requirements of Section 2, just quoted; and complains that the defendants refuse to ex-

Torreyson v. The Board of Examiners of the State of Nevada.

amine or pass upon his claim, for the reason that the capitol is not completed; and therefore they cannot legally act. The fact of non-completion is admitted. Does the conclusion attained by the Board of Examiners logically follow?

The two acts are to be construed together, and therefrom the intention of the legislature is to be sought. Turning first to the literal language, it would seem that the conclusion is correct. No claim can be examined or allowed under the Act of 1871, until the sum of one hundred thousand dollars is fully exhausted, "by indebtedness incurred, claims allowed, or warrants drawn against the same."

It is admitted, that no claim could be allowed or warrant drawn against the fund named, until the completion and acceptance of the capitol; but it is urged that indebtedness may, and necessarily must, be incurred against the same; and that when the sum of seventy-five thousand dollars has been allowed or drawn, as is the case, it is conclusively shown that an indebtedness to the whole amount of one hundred thousand dollars has been incurred. If the language of the two acts does not clearly express the intention of the legislature adversely to this proposition, of which there would seem to be no doubt, the application of some other rules of construction to the Act of 1871 makes the matter certain.

The title of a statute may be considered for purpose of construction. *Ex industria*, this act, Section 1, declares: "For the purposes recited in the title of this act, there shall be levied," &c. These purposes, so recited, are to pay for the "construction and completion of the state capitol."

Again, no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided. The admission, or without that, the natural consequence of the construction claimed by applicant, produces such result, as to the words "claim allowed or warrant drawn," of Section 4; as no such action can be had until completion and acceptance of the capitol. Here, then, in that section, are three disjunctive propositions; the incurrence of an indebtedness, the allowance of claims, the drawing of warrants, referring equally to *one common subject*, of which two must fall, and the other stand, if

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the applicant be correct. The more natural conclusion is that all must stand; and that, as no claim could be allowed, or warrant drawn, upon the one hundred thousand dollar fund until completion and acceptance of the capitol, so also no indebtedness could be incurred. Such is evidently the meaning and intention of the statutes cited; and that being the case, the Board of Examiners properly refused to consider the claim of applicant, and the writ must be denied.

It is so ordered.

**LEWIS HESS, RESPONDENT, v. CHARLES W. PEGG, et als.,
APPELLANTS.**

WASHOE COUNTY SEAT ACT CONSTITUTIONAL. The Act of February 17th, 1871, fixing the county seat of Washoe County at Reno, (Stats. 1871, 59) is not obnoxious to the constitutional provision against special and local legislation. (Art. IV, Sec. 21.)

CONSTRUCTION OF BORROWED CLAUSES OF CONSTITUTION. Where a constitutional provision has been borrowed from another state, after its meaning has been judicially determined by such state, the construction so put upon it is deemed adopted with the language.

JUDICIAL INQUIRY AS TO SPECIAL AND LOCAL LEGISLATION. As the legislature has no authority to enact a local or special law when a general one can be made applicable, it is competent for the courts, in case of a special or local act properly presented to them, to inquire whether or not a general law could have been made applicable.

CONSTRUCTION OF ARTICLE IV, SECTION 21, OF CONSTITUTION. It appearing that the constitutional provision against special and local legislation was borrowed from Indiana, and that previous thereto the Indiana courts had decided that a special or local law could not be enacted when a general one could be made applicable, and that a general law could be made applicable to the subject of the removal of county seats: *Held*, that the construction of the Indiana courts as to the meaning of the provision was adopted, but not their application of it to the subject of county seats.

JUDGES AS TO WHEN SPECIAL LEGISLATION IS PROPER. The decision as to whether a special or local law can be passed, or in other words, whether or not a general law can be made applicable, is primarily in the legislature; and its decision, though subject to review by the courts, will be presumptively correct.

PRESUMPTION WHERE BOTH GENERAL AND SPECIAL STATUTES. Where, notwithstanding the existence of a general statute in relation to the removal of county

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seats, the legislature passed a special act in reference to the removal of a particular county seat: *Held*, that the presumption was that the general act was not and could not be made applicable.

LEGISLATIVE POWER OVER COUNTIES AND COUNTY SEATS. The legislature has full and complete control of the entire subject of counties and county seats, save where prohibited by constitutional provisions.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The defendants, officers of Washoe County, against the removal of whose offices from Washoe city to Reno the injunction was obtained, were Charles W. Pegg, Sheriff; H. L. Fish, Recorder; J. S. Shoemaker, Clerk; Robert Fraser, Treasurer; Wm. Thompson, Assessor; and Wm. M. Boardman, District Attorney. The complaint was filed March 21st, and the injunction *pendente lite* ordered April 1st, 1871.

Ellis & King and *T. E. Haydon*, for Appellants.

I. It has been held in this state that the legislature may create a county, or change the boundaries of a county, or fix a county seat in a newly created county, and that such legislation was not subject to the objection of being special and local. *Clarke v. Irwin*, 5 Nev. 111. If that is a proper power for the legislature to exercise, it clearly carries with it the power to reëstablish or change the county seat if the public exigencies require, or the public necessities demand it. Again, Washoe County might have been divided, and one half given to Ormsby and the other half to Storey County. What, in that case, would have become of the county seat? The legislature might, in fact, have created a new county of Washoe, with the precise same boundaries as the present county, and fixed the county seat at Reno, if the public good had required it. Every step named would be constitutional, not local or special in the sense of the constitution, and the same result accomplished as in this case. The legislature cannot be denied the power to do directly that which may be done indirectly; it alone being the judge of the necessity of such legislation. 10 Howard, 536; 5 Nev. 111; 34 N. H. 275.

II. A county is a municipal corporation, and the legislature

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of its powers, and specially legislate as to its concerns, such matters affect its entity as a county. Const. Art. 1. 1 and 8; *City of Virginia v. Chollar Potosi*, 2 Nev. 402; 4 Iowa, 60; 10 Howard, 536; 4 Wheaton, Mo. 303; Walker's Am. Law, 219; 2 Kent's Com. 275; 275.

We claim that the word "general," as used in Art. IV, of the Constitution, is not the antithesis of "local," but the operation of laws upon the people, and has no referential territorial limits. A general law is one that affects all within its purview, or that stand in the same relation to it though it may have only a local effect. 3 N. H. 321; 17

Thus, in Indiana, with a clause in her constitution precisely the same, a law regulating the taking of fish in a particular part of that state was held a general law, and constitutional. 29 Ind. 344; see also 12 Pick. 344; 9 Greenleaf, 56; 5 Mass. 268; 11.

But if the law under discussion is local or special, the court was the judge as to whether a general law could be applied. 20 Ind. 409; 7 Cal. 65; 33 Cal. 487; 21 N. Y. Barb. 24; 4 Wheaton, 316; 7 Blackford, 415; 32 Maine, 533; *Clarke v. Irwin*, 5 Nev. 111; *Hooten v. Mc-* 5 Nev. 194.

What is meant by the language of "when a general law can be applicable"? Clearly, where a general law can be justly, equitably applicable; can be made applicable, and answer the purposes of legislation; i. e., best subserve the interests of that portion of the people, as the particular legislation is intended to affect. 5 Nev. 122. The legislature, chosen from and by the people, and knowing their local wants, can alone determine this question.

M. Clarke and *R. S. Mesick*, for Respondent.

The act in question is limited in its extent and operation to a particular part of the state and to a particular subject or thing, and is there-

fore local and special. Smith's Com., Secs. 276, 277, 278; 5 Nev. 111; 5 Nev. 194; 19 Iowa, 47.

II. At the time the act was approved, there was in force a general law for the removal of county seats. (Stats. 1867, 78) Of this the court will take judicial notice. It therefore appears with absolute certainty that a general law of uniform operation could be made applicable; and this, from the *decision* of the legislature.

The special law is therefore void. (Const. Art. IV., Sec. 21.)

III. Our constitutional provision, (Art. IV, Sec. 21) is borrowed from the constitution of Indiana, (Art. IV, Sec. 23). It had then been interpreted to deny to the legislature the power to remove a county seat. (*Thompson v. Com. Clay County.*) In borrowing the provision, the convention framing our constitution adopted the interpretation put upon it by the Indiana courts, and thus made the interpretation part of the constitutional law, and put it beyond the reach of the courts of this state. 3 Wis. 390; *Ash v. Parkinson*, 5 Nev. 15; *People v. Coleman*, 4 Cal. 46; *Anderson v. Millikin*, 9 Ohio, 579.

IV. The removal of county seats is the proper subject of a general law. All, or nearly all, the states have enacted general laws on the subject, and the inference is very strong that the general is the proper legislation. See general laws of California, 206; Texas, 1067; Michigan, 193; Kansas, 296; Iowa, 38; Indiana, 194; Missouri, 215; Nebraska, 46.

By the Court, WHITMAN, J.:

The legislature of this state, at its last session, passed an act fixing the county seat of Washoe County, after a certain date, at the town of Reno, in said county. Thenbefore, Washoe City had been the county seat. Respondent, upon his bill in equity, sought and obtained, from the district court in and for said county, an injunction *pendente lite*, restraining the appellants, county officers, from removing their offices and archives, as provided by the statute referred to. From that order this appeal is taken.

For the purpose of the present opinion, it will be assumed that

the respondent had rights which he could enforce, and that he has sought the proper remedy therefor. It is claimed, on his part, that the statute is obnoxious to the twenty-first section of the fourth article of the state constitution, as follows: "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." This claim is based mainly upon two propositions. First: that at the time of the passage of the statute under consideration, there was already in existence a general act upon the subject of the removal of county seats; hence, as is urged, indisputable proof that such a general law as provided by the constitution could be made applicable. Second: that in Indiana, whence the constitutional clause quoted was evidently borrowed, its meaning had been judicially determined adversely to the statute resisted, before the adoption of such clause as part of the constitution of this state; and that such construction, by virtue of a well known rule, should be deemed adopted with the language.

The gist of the latter proposition has already been affirmed by this court. *Ash v. Parkinson*, 5 Nev. 15. Such is the general rule, subject to certain limitations. Cooley's Const., Limitations, 52, and cases there cited. It is not proposed to depart from it in this instance. The question then arises, what was decided in the case mentioned, which was or could have been lawfully adopted, or should now be presumed to have been adopted, by the constitutional convention of Nevada? By reference thereto, (*Thomas et als. v. Board Commrs. County of Clay et als.*, 5 Ind. 4) it will be seen that all therein that touches the interpretation or construction of the constitutional language, is, the decision that the legislature has no authority under the constitution to enact a local or special law, when a general law can be made applicable; and that it is competent for the courts to inquire whether a general law can be made applicable to the subject matter of a local or special law enacted by the legislature.

The framers of the constitution of this state may properly be held to have adopted this interpretation or construction of the language borrowed by them from the constitution of Indiana; but it by no means follows that they adopted or could properly be pre-

sumed to have adopted the remainder of the decision, which holds that the removal of county seats can be made the subject of a general law. That portion of the decision is simply the exercise of the power declared to exist in the court, and there may well be a difference of opinion whether such exercise of power was warranted even in the case under review; but whether so or not, that is a matter which cannot be held as a rule, or a constitutional interpretation or construction, but must always remain an exercise of judgment, based, under the law, upon the facts of each case as it arises. So far as the reported case shows anything on this point, it shows an undue assumption of power, and an erroneous exercise of judgment.

Primarily, the legislature must decide whether or not, in a given case, a general law can be made applicable. That decision may be reviewed, and upheld or reversed by the courts, (*Clarke v. Irwin*, 5 Nev. 124) but presumptively, the decision of the legislature is correct. As has been well said by Chief Justice Dillon, on an analogous subject: "When the public exigencies demand the exercise of the power of taking private property for the public use, is solely a question for the legislature, upon whose determination the courts cannot sit in judgment. What is such a public use as will justify the exercise of the power of eminent domain, is a question for the courts. But if a public use be declared by the legislature, the courts will hold the use public, unless it manifestly appear by the provisions of the act, that they can have no tendency to advance and promote such public use." *Bankhead v. Brown*, 25 Iowa, 540. This rule is of course to be applied when courts are deciding simply upon the act, in absence of other testimony.

So here, there being nothing before this court except the statute, unless it manifestly appear that a general law could have been made applicable, the one under discussion must stand. To be applicable, the law must meet the just purposes of legislation, and be calculated to as well subserve as any other the interests of the people of the state, or the particular class or portion to be affected. *Clarke v. Irwin*, 5 Nev. 111. Respondent claims that such is this case; and not only so as an abstract proposition, but that this legislature has manifested the fact, by passing such a general law. The inference is the other way. The general law referred to is operative

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only under certain conditions. Did these conditions exist in this case? There is nothing before this court to show whether they did or did not. Perhaps imperative reasons of public policy, or the good of the people of Washoe County, demanded the Act of 1871.

The very passage of this special law raises the presumption that the general act was not, and could not be made, applicable. There is nothing to rebut this presumption.

That the legislature may, in a proper case, pass a law, either local or special, is undoubted: and was so held in Indiana, before the adoption of the constitution of Nevada. *Cash v. The Auditor of Clark County*, 7 Ind. 227. In another case from the same state, it is said: "There is no provision of the constitution prohibiting, in terms, special legislation on the subject of railroads; and from the peculiar character of the subject, we cannot say such legislation may not be proper. Special subjects may require some special legislation; and when it takes place, it will be for the court to judge, as in the Clay County case and the Lafayette murder cases, under Section 23 of Article IV of the Constitution, [identical with Section 21, hereinbefore quoted from the constitution of the state of Nevada] whether more general legislation could reasonably have been made applicable, (5 Ind. 4, and 7 Ind. 326); and also, whether such special legislation conflicts with any other constitutional provision." *Madison and Indianapolis R. R. Co. v. Whitenbeck*, 8 Ind. 217.

If it had been intended under the constitution to prohibit all special or local legislation, it would have been so written. The Supreme Court of Indiana, in a comparatively recent case, 1868, which, by the way, overrules the Clay County case before cited, goes further, and says: "It is clearly implied by that section, (23 Ind.; 21 Nev.) and we know it to be true in fact, that in many cases local laws are necessary, because general ones cannot properly and justly be made applicable. There are cases where a law would be both proper and necessary in a given locality or part of the state, where its subject is local, or where from local facts it is rendered necessary; but which, if made general, would either be inoperative in portions of the state, or from its inapplicability to such portions,

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would be injurious and unjust.” *Gentile v. The State*, 29 Ind. 409.

That special or local legislation is to be avoided, so far as practicable, is undoubtedly the teaching of the constitution ; thus far and no farther it goes. Hardly any subject can be conceived more purely local than the fixing a county seat, and if in any case local legislation is proper, that is the one. The legislature has full and complete control of the entire subject of counties and county seats, save where prohibited or limited by constitutional provisions, as in Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Ohio, Wisconsin and perhaps some other states which have escaped attention in this examination. It may act directly, or it may do so indirectly, by the action of agents or the assent of a majority or more of the citizens of a county ; and this is not a delegation of legislative power, as has been frequently decided in analogous cases. *Hobart v. Supervisors of Butte County*, 17 Cal. 23. There is no reason why both the statutes herein referred to should not stand ; that called the general one to serve its purpose ; any special one to be enacted when the former fails to accomplish the proper and legitimate objects of legislation.

For this court to oppose its judgment to that of the legislature, excepting in a case admitting of no reasonable doubt, would not only be contrary to all well considered precedent, but would be an usurpation of legislative functions. It cannot be denied that the tendency in some states of this Union is that way, undoubtedly from good motives ; but the sooner the people learn that every act of the legislature not found to be in “clear, palpable and direct conflict with the written constitution,” must be sustained by the courts, the sooner they will apply the proper correction to unjust or impolitic legislation, if such there be, in the more careful selection of the members of that branch of the state government to which they have delegated and in which they have vested the “legislative authority” of this state. No court should, and this court will not, step out of the proper sphere to undo a legislative act ; and therein, no court should, and this court will not, declare any statute void because unconstitutional, without clear warrant therefor.

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As has been seen, no such warrant exists in this case. The order of the District Court granting an injunction is therefore reversed, and the cause remanded, with directions to dismiss the bill of respondent.

GARBER J. : I dissent.

J. KALMES, RESPONDENT, v. G. M. GERRISH, *et al.*, APPELLANTS.

EVIDENCE—SUBSCRIBING WITNESS. Where a lease having a subscribing witness was admitted in evidence without calling such witness, or accounting for his absence, and the opposing party objected thereto: *Held*, error.

MAKING PARTIES WITNESSES DOES NOT CHANGE RULES OF EVIDENCE. The statute making parties competent witnesses does not abrogate the rule of evidence requiring a subscribing witness to a written instrument to be called, or his absence accounted for.

TESTIMONY OF PARTY NOT BEST EVIDENCE WHERE SUBSCRIBING WITNESS. Where a party desiring to introduce in evidence a written agreement signed by himself with a subscribing witness, took the stand and testified to its execution; but the opposite party objected to its admission on account of the subscribing witness not being called, nor his absence accounted for: *Held*, that such testimony, not being the best evidence, was not sufficient to authorize admission of the paper.

RECORD ON APPEAL MUST SHOW ACTION APPEALED FROM. Where an appeal purported to be from an order overruling a motion for new trial, and the record failed to show that the motion had been disposed of, or acted on: *Held*, that the appeal was premature and should be dismissed.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

This was an action to recover \$1,650 from G. M. Gerrish and H. Taft. Plaintiff set forth the making of a written agreement between himself and H. C. Coulson, by which, in December, 1868, he leased of Coulson a lot in the town of Hamilton, and agreed to erect a building thereon, and lease the same to Coulson for six months, at \$150 per month, said Coulson to have the privilege of purchasing the building for \$1,500; also, the erection of the building; a promise of Coulson to purchase it for \$1,500; the purchase

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of the premises by the defendants from Coulson, in April, 1869, subject to the conditions of the agreement, and with full knowledge thereof; and an allegation of indebtedness for one month's rent and the value of the building. On the trial, the plaintiff, as a witness on his own behalf, testified to the due execution of the written agreement; but it appearing, on its production, to have been executed in presence of John Gray as subscribing witness, defendants objected to its admission in evidence, unless the subscribing witness was called, or his absence accounted for. The objection was overruled.

The judgment was for plaintiff, as prayed for in the complaint; and there was a finding, among other things, of an oral agreement on the part of the defendants, with the plaintiff, to purchase the building for \$1,500—an agreement not clearly alleged in the complaint.

Tilford & Foster, and *F. W. Cole*, for Appellants.

I. The proposition that proof must be made by the best evidence is old and familiar. The statute, as well as the common law, has made the subscribing witness to an instrument in writing the person who must prove its execution; and consequently his evidence is the best evidence of that fact, unless the proper foundation for secondary proof has been laid. This is the law of the land to-day, and will remain so until it has been changed by legislative action. 1 Greenleaf's Ev., Sec. 569; 1 Phillips' Ev. 464; *Henry v. Bishop*, 2 Wend. 576; *Stevens v. Irwin*, 12 Cal. 306; *Sanders v. Bolton*, 26 Cal. 413; *Hollenback v. Flemming*, 6 Hill, 303; 7 Johns. 136. The fact that a party to a suit may now be called as a witness on his own behalf at the trial has not altered the law, nor changed the reason of the rule. Why should a party to a suit be allowed to prove that which the law says cannot be done by a stranger to the action? If Coulson, not a party to this suit, could not prove the execution, under what system of reasoning can Kalmes, a party to this suit, prove what the law forbids Coulson to do?

II. The complaint nowhere states an agreement between defendants and plaintiff, that defendants would pay plaintiff the \$1,500

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and the \$150 as a part consideration for the purchase of the property. The finding is, therefore, not proper, because there is nothing in the pleadings upon which it can be based.

Thomas P. Hawley, for Respondent.

I. The rule requiring the testimony of a subscribing witness to be first obtained, or his absence accounted for, was engrafted into the system of the common law at a time when the parties to a suit could not, on account of their interest, be witnesses in their own behalf. Hence, it was claimed, that by selecting a subscribing witness, "the parties agreed that the proof of their hand-writing should be made through that medium." It was also considered to be the *best evidence*, as the parties who subscribed their names as witnesses to an instrument were presumed to be more likely to recollect the fact of its execution, and also to know the hand-writing of the parties, than other persons who were not present at the time the instrument was signed. The peculiar hardships of cases where the original instruments were lost, gave rise a departure from the rule which prohibited parties from testifying in their own behalf, and allowed them to appear as witnesses to prove the loss of the instrument. When this innovation was first made, it was held that, although a party in interest to a suit was competent to prove the loss of an instrument, he was *not competent* to prove the *contents thereof*. The great injustice of such ruling soon manifested itself, and induced the judges to cut off this useless and absurd distinction; and the wisdom of modern times in America has engrafted upon the statutes of many of the states—including our own—a special law entirely abrogating the old rule, and permitting everybody to testify in their own behalf upon every question involved upon the trial of the cause wherein they are interested.

Courts have held that the execution of an instrument may be proved by the confession of the party who executed it, although the name of a witness was subscribed thereto. *Hall v. Phelps*, 2 Johns. 451; *Giberton v. Ginocchio*, 1 Hilton, N. Y. C. P. 220; *Manrie v. Heffernon*, 13 Johns. 75. If this be sound doctrine, then why not advance one step more in behalf of common sense and sound reason? Why cling with such pertinacity to the old

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rules, when the necessities that called them into existence have been entirely removed? Why adopt a rule because it is ancient, when the reason for the rule no longer exists? See also, *Landers v. Bolton*, 26 Cal. 411.

II. It was wholly immaterial to the final decision, as rendered by the judge, whether any such agreement was ever executed or not. Conceding, for the sake of argument only, that it was error to admit the agreement on the first branch of the case without first having produced the subscribing witness, or accounted for his absence, would this fact have a tendency to have affected the judge's decision upon the other branch of the case? Most assuredly not. If not, then no injury was done defendants in this case.

By the Court, GARBER, J.:

We think there was error in the admission of the agreement between Coulson and the plaintiff, without proof of its execution by the subscribing witness. If the only reason for the rule were the presumption that the subscribing witness may know facts of which others are probably ignorant, there would be at least plausibility in the argument of respondent that, as by our statute, the parties are competent witnesses, and as no presumption can arise that the subscribing witness is better informed of the facts relating to the execution of an instrument than the parties to the instrument, the maxim "*cessante ratione*," &c., should be applied. But there is another reason for the rule, and one which forbids the application of the maxim invoked. "The law requires the testimony of the subscribing witness, because the parties themselves, by selecting him as the witness, have mutually agreed to rest upon his testimony in proof of the execution of the instrument, and of the circumstances which then took place." Starkie on Ev., Sharswood, 458. It was not the intention of the statute to abrogate this rule of evidence, and it has been decided that such is not its operation. *Brigham v. Palmer*, 3 Allen, Mass., 452; *Whyman v. Gath*, 8 Exch. 803; *McMurtrey v. Peebles*, 4 Monroe, 40. It is immaterial whether the writing is the foundation of the action, or is introduced collaterally. The rule and the reason of it are equally applicable in the one case as in the other. *Roberts v. Tennell*, 3

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Monroe, 250 ; Starkie, 507. We cannot disregard the error assigned as necessarily harmless. The testimony as to the making of the express promise found by the court was conflicting, and the weight given by the judge to the facts evidenced by this writing may have turned the scales in favor of the plaintiff. Unquestionably, the existence of this written agreement tends to enhance the probability of the making of the oral agreement testified to by plaintiff and found by the court. A point similar to that raised but not decided in *Mellen v. Whipple*, 1 Gray, Mass., 317, is made by appellant—that no promise in fact is so stated in the complaint as to support a judgment on the finding of such a promise. It is unnecessary to pass upon it here, as the plaintiff, if so advised, can amend his complaint and obviate the objection.

The appeal purports to be taken from the judgment, and from an order overruling the motion for a new trial. The record fails to show that the motion has yet been disposed of, or acted upon by the district court. The appeal from the order is therefore premature, and is dismissed. The judgment appealed from is reversed and the cause remanded.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEVADA,
JULY TERM, 1871.

AARON D. TREADWAY, RESPONDENT, *v.* WILLIAM SHARON, *et al.*, APPELLANTS.

FIXTURES — STEAM SAW-MILL BOILER, ENGINE AND MACHINERY. Where a steam saw mill, put upon land for the purpose of sawing up the timber upon it, had its foundation planted in the ground, and the engine, boiler and machinery were attached by bolts, belts, shafts and pipes to the frame work, which was built upon such foundation: *Held*, that such boiler, engine and machinery were fixtures.

INTENTION NOT MATERIAL ON QUESTION OF FIXTURE OR NOT FIXTURE. The fact that there is but a limited supply of timber on land upon which a steam saw-mill is put, and that it is the intention to remove the mill as soon as the timber is sawed, does not render the boiler, engine and machinery, otherwise fixtures, any the less such.

CAPEN VS. PECKHAM, 35 CONN. 88, and other cases, holding that on a question of fixture or not fixture, intention is a universal criterion and controlling test, are in direct antagonism with well established principles.

PRINCIPLE OF TENANT'S RIGHT TO REMOVE FIXTURES. The law indulges a tenant with the right of removing fixtures during his term, not out of any regard to his intention, but by way of exception to a rule which would otherwise work hardship or retard improvement.

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REMOVAL AFTER PATENT, OF FIXTURES ERECTED ON PUBLIC LAND. Where occupants of public land erected fixtures, consisting of a saw-mill, thereon, but failed to take any steps to acquire the title to the same; and afterward the land was selected by the state, and (not being applied for by the occupants within months) was duly sold and patented to other parties, subsequent to which occupants removed the mill: *Held*, that they were trespassers, and liable for damages for such removal.

GOLD COIN JUDGMENT IN TRESPASS CASE. A judgment for gold coin in a trespass case is in conformity with the statute, (Stats. 1869, 228) which is constitutional.

CUSTOM—INSUFFICIENCY OF PROOF. Where a custom was claimed to exist in relation to the machinery of saw-mills, that after being put up on timber land and the timber in the vicinity all sawed it was moved away to other land—the object of said alleged custom being to show that certain saw-mill machinery was not a fixture—and testimony was given by a single witness, that “saw-mills in this country, are built to saw the timber in their vicinity, and when the timber is sawed the machinery is moved away and the frame left, as a general thing;” and the court found that the machinery in question was a fixture. *Held*, that even if a custom could be proved by one witness, the finding against the alleged custom should not, under the testimony here, be disturbed.

APPEAL from the District Court of the Second Judicial District in Ormsby County.

This was an action against William Sharon and Joseph A. Richardson to recover damages for alleged trespass in removing a saw-mill, including its boiler, engine and machinery, from the southeast quarter of section 34, township 16 north, range 19 east, in Ormsby County. The land is the same which was in controversy in the case *O’Neale v. Cleveland*, reported in 3 Nev. 485. Cleveland, who had been in possession of it, appears to have transferred the occupancy to John R. Knox & Co., who put up the saw-mill in 1864 and in the same year sold out to Mr. Sharon. The state selected the land July 3d, 1868; and the patent to Treadway was issued October 27th, 1869. The mill was removed in November, 1869. There was a judgment for plaintiff in the sum of \$3,500, gold coin, from which, a motion for new trial having been denied, an appeal was taken.

On the trial Thomas Andrain, a witness for plaintiff, on cross-examination, testified, among other things, as follows: “I own saw-mills in El Dorado County, California. I know how saw-mills are built in this country; they are built to saw the timber in the

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7; and when the timber is sawed the machinery is moved and the frame left, as a general thing. The mill in dispute of those I spoke of." The foregoing was the only proof of

yer, Wood & Deal, for Appellants.

The property was personal, and belonged to defendant. It was no part of the realty, and did not vest in the plaintiff by his purchase. Whether a fixture passes with the land, depends upon various considerations, as the circumstances under which it was placed on the land, the intention of the party who placed it there, the character of the fixture and its use, the means by which it is attached to the land, and whether it can be removed without material injury to the freehold.

At the commencement of this action defendants were in possession, claiming the right to the premises. They entered by purchase of the state. Their title was good against all the world except the state at the time the patent was issued to plaintiff. The relations that existed between the state and defendants were those of landlord and tenant, and it was a tenancy under an implied agreement that defendants might remove all improvements placed on the land by the tenants.

The machinery was placed in the mill for the purpose of sawing the timber that could be sawed with profit, and then of being moved to some other locality, there to be again used for the same purpose. It had been used in the same manner before it was placed in the mill. Whatever conflict there may be in the books as to fixtures, there is no respectable authority to support the position that trade fixtures cannot be removed by the tenant. It is the custom in this state to remove such machinery.

It would be disastrous to the interests of this state if those who have settled upon public lands may be deprived of costly machinery placed by them upon the public land for manufacturing purposes, by those who have the shrewdness to ascertain the fact that such machinery is upon the land, and that the land is for sale. The state has been settled and its resources developed by its pol-

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icy of permitting its lands to be occupied by the first comer and protecting him in his possession. It certainly ought not to be permitted to take away the property of such settler who has entered under its permission and made improvements under its encouragement.

V. There was error in entering judgment for gold coin. This is not a case of contract. Legal tender notes can be paid in satisfaction of any debt except in the case of one created by specific contract. The legislature has as much authority to enact that payments for work done shall be in gold coin, as in the case of damages.

A. C. Ellis, for Respondent.

I. This is an action in a state court, the remedies in which the Federal Government has no control over. But when defendant tender currency in satisfaction of the judgment, it will be time enough to raise the point that legal tenders will and ought to satisfy it.

II. The mill was a part of the *land*; its foundation was buried or dug into the ground; the boiler bricked over; the pipe connecting boiler and cylinder fastened by screws and solder, and the foundation of the cylinder let into the ground, and the whole connected with the other machinery by belts and shafts, and attached to and under the general building.

The mill was part of the realty, and passed with it. 14 Cal. 59; 20 Wend. 639; 35 Barb. 58; *Pyle v. Pennock*, 2d Watts & Leigh, 390; 4 Humph. 431; 3 Hill S. C. 331; 11 N. H. 540; *Farren v. Stackpole*, 6 Greenl. 154.

III. The proposition that defendant Sharon was a *tenant* of the state, and hence had the right of removal, as trade fixtures, cannot be maintained. Defendant fails to show any compliance with any law of Nevada which would entitle him to possession of the land for a moment. He was a naked trespasser, stripping the state land of its timber. Because in every case cited, the relation of landlord and tenant existed beyond any question; and where removal was tolerated at all, it was always within the term and solely

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in the interest of trade; and the rule reiterated, as it was at common law, that, as between heir and executor, grantor and grantee, the strictest construction was given to the doctrine of fixtures. What becomes, then, of the doctrine of *intention*, as referred to in 1st Ohio St. 511?

IV. Before intention can be considered as having any bearing upon a question of fixtures, the relation of landlord and tenant must be clearly established. There must be some privity of estate between the party claiming the right of removal and the party resisting the claim, or those claiming under such party.

Clarke & Wells, also for Respondent.

By the Court, GARBER, J. :

The boiler and engine in controversy were actually and firmly annexed to the soil—*solo infixa*, in the strictest sense of the term; and the other articles, if not actually, were constructively annexed, and follow the nature of the principal portion of the machinery, as essential parts of one entire combination. The machinery was “annexed to the freehold for the better enjoyment of the freehold, attached to the soil for the soil’s use, and essential to the inheritance for its only valuable purpose.” It therefore became a fixture. It is true, the parties testified that they erected the mill with the intention of removing it. But such evidence was palpably inadmissible; and although admitted without objection, is entitled to no weight whatever. *Wadleigh v. Janvrin*, 41 N. H. 512.

It is urged that an intention to devote these articles as a permanent accession to the freehold, was a prerequisite to their conversion from chattels into realty; and that, as there was only a limited supply of timber in the vicinity of this mill, which could be hauled to and sawed by it without loss, such intention is not only not proved, but the contrary is clearly inferable.

Now, every saw-mill may, sooner or later, exhaust the available timber in its immediate vicinity—yet, it would hardly be contended that a saw-mill, as such, is always and necessarily a chattel. That all the available ore in a quartz lode may be extracted, is as true as that all the available timber near a mill may be sawed; and it

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rarely, if ever, happens that the machinery first erected on is suited or intended to do the work of hoisting and pump the deeper workings, which favorable developments may. Yet ever since the great case of *Fisher v. Dixon*, it has settled law, that machinery annexed to the soil for mining part of the soil; and in *Merritt v. Judd*, 14 Cal. 60, a small engine and pump were adjudged to be fixtures. If it was the intention, in the latter case, to work the ledge to any great depth, it must also have been the intention to replace this small engine and pump with others, larger and of greater power. It can be said, then, that an intention to remove, at any time, however remote, for instance, when the greatest depth consistent with profitable working shall have been attained, or whenever more powerful machinery must be used—controls the act of annexation, and the presumption that thereby the chattel is made a part of the realty. Then, where shall the line be drawn? If a steam pump capable of draining the mine to a depth of five hundred feet, or a saw-mill of timber for three years' sawing, remain chattels, with how much power would the engine, and with how much timber would they become a fixture? The mill in question, a large, well equipped and perfectly appointed steam mill, was actively operating for three years. The same body of timber might have supported a smaller mill, poorly constructed, for many years. Would it become real estate, and the former remain a chattel? The law, controlling the annexation, and not the intention, which controls in such cases as this, is shown by the law as to young trees, temporarily planted in a nursery and intended for transplantation and sale. They are a part of the realty; at common law, go with the land to the vendee, pass to a vendee of the land. *Maples v. Mallon*, 31 Conn. 1; *Lee v. Risdon*, 7 Taunton, 188; *Smith v. Price*, 39 Ill. 2.

If this machinery was personal property after annexation, common law larceny could have been committed of it. But growing corn is the subject of such felony, because it is "attached to the freehold." 1 Hawkins P. C. 148. The cases cited by the appellants, (one of the latest and best reasoned of which class is *v. Peckham*, 35 Conn. 88) are shown to be in direct antagonism with well established principles, by the very illustration

upon to prove that, in questions of this kind, intention is a universal criterion and controlling test. For if, in order to constitute an article a fixture, it must appear that a permanent accession to the freehold was intended; and if, in cases arising between landlord and tenant, a presumption arises from the relation of the tenant to the property, that he did not intend to make trade fixtures erected by him a part of the realty, thus making a donation of them to the owner of the soil; it should follow, as these cases assume, that such trade fixtures retain their quality of chattels, and are no part or parcel of the realty.

But we take the law to be, that trade fixtures do become part of the realty, whatever intention to the contrary on the part of the tenant erecting them may be inferred from his limited interest in the land. *Lee v. Risdon, supra*; *Coombes v. Beaumont*, 5 B & Ad. 72; *MacIntosh v. Trotter*, 3 M. & W. 184; *Powers v. Denison*, 30 Vt. 752; *Mott v. Palmer*, 1 Comstock, 564; *Pemberton v. King*, 2 Dev. 376; *Reynolds v. Shuler*, 5 Cowen, 323; *Boyd v. Shorrocks*, L. R. 5 Eq. 72.

Although part of the realty, the law indulges the tenant with the right of removing them during his term, not out of any regard to his intention, but by way of exception to a rule which would otherwise work hardship or retard improvement. For the same reason, they could be taken under a *fi. fa.*, and passed to the executor, thus extending the benefit of the exception to the creditors of the lessee. Just as emblements, though part of the realty so as to pass the vendee or devisee of the land, and to belong to a successful plaintiff in ejectment, went at common law to the executor and were subject to levy, by reason of an exception introduced for the benefit of the creditors of tenant in fee. 2 Black. Com. 404. Trade or removable fixtures, erected by a tenant for life or years, pass by a grant of the land, or a mortgage or assignment of the term or lease—by instruments in which no mention of them, *eo nomine*, is made. Why? Because they are part of the realty described. If still chattels, they would no more pass than a horse of the tenant standing in a stable on the land.

To apply the other illustrations used in *Capen v. Peckham* to this case, suppose it had been found that the articles here in question were

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annexed for the single purpose of steadying them for more convenient use as chattels, without any intention to benefit or improve the realty; and that they were removable without any appreciable damage to themselves or to the freehold. If, as is asserted in *Capen v. Peckham*, these findings would "show for what purpose the annexation of the articles was made, that it was done with design to make them part of the realty," it follows that such design, instead of being "material and important," is simply irrelevant. For the addition of the supposed findings to those already in record would not vary the result. The machinery in question would still be deemed a fixture. *Climie v. Wood*, L. R. 4 Exch. 32; *S. C. L. R. 3 Exch. 259*; *Longbottom v. Berry*, L. R. 5 Q. 138; *Mather v. Fraser*, 2 Kay & Johns, 548; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; *Johnson v. Wiseman*, 4 Met. (K.) 357.

These fixtures were not removable by appellants, either as tenants or by custom. At the time the mill was erected, and for more than a year thereafter, the land described in the complaint was public land of the United States; and consequently, during all that time the parties erecting and running the mill were naked trespassers. The mill passed to the state of Nevada, with the land, on the third day of July, 1868. Appellants claim that, by the state statute, they, as occupants, had the right of preëmption for six months after July 3d, 1868; and that hence their position was analogous to that of a party holding possession under agreement to purchase *after the agreement is ended*; and, therefore, analogous to that of a tenant at will of the state. If this be conceded, the supposed tenancy will must have had its inception on the third of January, 1869, more than a year after the completion of the mill, and was therefore not a tenancy of the mill, as well as of the land.

The right of removing trade fixtures has been liberally construed in favor of the tenant: yet, we believe, never so liberally as to embrace, not only those erected during the term, but also such as constitute a portion of the thing demised.

The most appellants can claim is, that the statute was passed in contemplation of the selection of the land by the state, and the mill was erected on the faith of the right of preëmption given by it.

statute; and that, consequently, they and their predecessors occupy the position of one entering into possession of, and erecting trade fixtures upon land, under a right to purchase subsisting at the time of the erection, but afterwards forfeited and lost by his own laches. Such an occupant has no greater right to the fixtures, as against the purchaser whom he suffers to acquire the title to the land, than has the vendor of land as against his vendee. *King v. Johnson*, 7 Gray, 240; *Hemenway v. Cutter*, 51 Maine, 497; *McLaughlin v. Nash*, 14 Allen, 136.

Then, whether the mill was erected by trespassers on the land, or by parties clothed with a right of preëmption, the result is the same. On either view, the question is, would the machinery have passed to plaintiff, if, instead of obtaining a patent from the state, he had taken from the appellants a deed for the land? We think it would have passed, under the general rule that, when a chattel has been affixed to the soil, it passes with the soil. Between landlord and tenant this rule was relaxed, to relieve the tenant from the dilemma of submitting, either to the inconvenience of conducting his business with articles capable of use without annexation, or to the injustice of surrendering to his landlord, at the expiration of the term, articles unfit for use unless so fastened and steadied as to become fixtures. But this relaxation is strictly an exception to the general rule, to be extended only to cases within the policy and exigency which gave rise to it.

The appellants were not placed in the dilemma from which the exception rescued the tenant. All they had to do was, to avail themselves of their right to acquire the title to the land. Failing in this, they can with as little reason complain of the rigor of the rule of law, as could a vendor, failing to avail himself of his right to disannex before selling, or to except the fixtures in the deed. As to the custom relied on, even if a custom can be proved by one witness, we cannot say the court below erred, in finding, as presumably it did, against the existence of a custom evidenced as this was. *Bissel v. Ryan*, 23 Ill. 556, and cases cited.

On the question of value, there was evidence to sustain the finding, irrespective of that based on profits.

The finding and judgment for gold coin conform to and are author-

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ized by the statute. (Stats. of 1869, 228, Sec. 202.) Of constitutionality and validity of that statute, we entertain no doubt and shall adhere to our former decision upholding it.

The judgment and order appealed from are affirmed.

By WHITMAN, J., dissenting:

The district court rendered a judgment against appellants for the value of certain machinery, by them taken from the land of the respondent. The court finds that they removed therefrom "a certain steam engine, steam boiler, circular saws, and other machinery appurtenant to and belonging to a certain saw-mill situated upon said land; that the said mill was attached to the soil by foundation planted in the ground, upon which the frame-work of the mill was built, and that said engine, boiler, saws and other machinery pertaining to said mill, were attached thereto by being bolted to the frame-work of the mill, and by means of belts, shafts and steam-pipes, in such a manner as to make said mill available for the manufacturing of lumber; that said engine, boiler, saws, and other machinery, were fixtures and a part of said real estate."

Were they so fixtures, and part of the real estate? There would at first seem to be very considerable confusion of authority in the decided cases touching the constituent qualities necessary to change a chattel into a fixture, personalty into realty; but a careful examination of the leading cases will dissipate this fog, more apparent than real. The first thing to be looked for is a rule of decision; and as to that, it will be found in many instances that a looseness of language has been indulged in, and there has been failure to clearly express as premise, what, upon review of conclusions, will be seen to have been generally accepted and acted upon. In a very elaborate opinion, touching the question in all its bearings, and upon a careful comparison of decided cases, Chief Justice Bartley proposes the following, saying: "I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture: 1st. Actual annexation to the realty, or something appurtenant thereto. 2nd. Appropriation to the use or purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation to make the ar-

ticle a permanent accession to the freehold—this intention being **inferred** from the *nature* of the article affixed, the *relation and situation of the party* making the annexation, the structure and mode of annexation, and the purpose and use for which the annexation has been made. This criterion furnishes a test of general and uniform application, and by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject." *Teaff v. Hewitt*, 1 Ohio St. 511. This rule is approved in the recent case of *Potter v. Cromwell*, 40 N. Y. 287.

The facts of this case, so far as it is necessary to recite them, are, that Sharon, by his agents, entered upon the land in question on or about the fourth day of November, 1867, for the purpose of running the saw-mill before mentioned. That he was the grantee of the Brothers Knox, who, as lessees of one Cleaveland, (claiming title to the land) had gone thereon, erected the saw-mill with the intention of cutting the available timber, and then removing. The machinery put up for this purpose had been brought from another place, where it had been similarly used and, with its housing constituted one of a class of mills such as the witness Andrian testifies "are built in this country; they are built to saw the timber in their vicinity, and when the timber is sawed, the machinery is moved away and the frame left, as a general thing." At the time of this erection by the Knox Brothers, their lessor was in possession of the land, having a house upon it, and claiming to purchase or obtain title from the state. There was a contest about the land, between Cleaveland and another party not interested in this suit; but afterward a receipt was endorsed upon the land warrant of Cleaveland, filed with the state register, which constituted, under the act of 1867, *prima facie* evidence of title in him for the time being. (Stats. 1867-68, Sec. 9.) Cleaveland afterward, on the 9th of March, 1869, as is claimed by respondent, forfeited all claim to the land, and a patent was issued to the latter on the twenty-seventh day of October, 1869.

Whether that be so or not is no pertinent inquiry in this case under the pleadings, and this statement with regard to the title is made simply to show how the appellants happened to be upon the

land, to which respondent, so far as this case is concerned, has the absolute legal title.

Respondent never has been in possession of the land ; and appellant so being, on or about the eighteenth of November, 1869, removed the machinery in dispute. The land was selected by the state, under the act referred to, in July 3d, 1868. For six months from that date, by the express terms of the statute, "an occupant or party in possession" had a preferred right to purchase. What position did the occupant or possessor take after the expiration of that period ? Evidently not that of a naked trespasser, as claimed by counsel for respondent, for the whole tenor of the statute is encouragement of said occupants or possessors. The condition would seem to be analogous to that of a party in possession, under agreement or permission to purchase after the agreement is ended. Not a tenant in the ordinary sense of the word, "for the possession was evidently taken in such case with the understanding of both parties—that the occupant should be owner, not tenant ; and the other party cannot, without his consent, convert him into a tenant, so as to charge him with rent ; but if the vendee remain in possession after the agreement is ended, he is liable in use and occupation for the period of his occupancy." Taylor's Landlord and Tenant, 19-20. The author adds in a note : "The vendee's right is a bare right to occupy—called a strict tenancy at will—and being nothing more than a license determinable by mere demand, upon which ejectment lies without any notice to quit. To the same effect upon the general proposition, see *Frisbie v. Price*, 27 Cal. 253.

Thus these defendants stand at the date of plaintiffs' patent—tenants at will of the state of Nevada, having a saw-mill upon the land in question, built for a fugitive and temporary purpose, with the intention of removal according to a general custom of the trade they were exercising. Now, apply the rule in the light of decided cases, and test the status of the property in question ; and first, without reference to the termination of the tenancy.

One Coombs by permission of Doty moved a building on the premises of the latter, and occupied it as a shop. It was sold at constable's sale upon execution against Coombs to Gorham, who entered upon Doty's premises and removed it. In an action of

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trespass by Doty against Gorham, for entering his close, destroying his fence and removing the shop, there was a judgment for defendant, which was sustained by the court upon the ground that the shop was a chattel, which Coombs, tenant at will, might rightfully have removed while he continued to own it during such tenancy. *Doty v. Gorham*, 5 Pick. 487.

“A being the owner of a mill privilege, bargained by parol to sell it to B & C, who went on by permission of A and built a mill thereon. Soon afterward a creditor of B & C, in a suit against them, attached the mill as their personal property, and caused the same to be sold on execution, D being the purchaser, and A being present at the sale, and stating that he did not claim it. About three years after this, the mill in the mean time having been in possession of A, was sold by him with the privilege for a valuable consideration to E, conveying it by deed of warranty; E having no notice of the claim of B & C, or D, the purchaser under them. *Held*, that under the circumstances the mill never was part of the freehold, but was the personal property, first of B & C, and then of D, and that the latter might maintain trover for the mill against E on his conversion of it.” *Russell v. Richards, et al.*, 1 Fairfield, 429.

If one man builds a house on land of another by his permission, the house is personal property, and does not pass by the conveyance of the land to a third person, but remains the property of the builder. *Tupley v. Smith*, 18 Maine, 12. It was held in Wisconsin, upon the ground of custom, that a house might be removed by an outgoing tenant who had built upon a vacant lot, though no such permission was given by the lease. *Keogh v. Darnell*, 12 Wis. 163. So with a cider-mill and press in New York, on the ground of trade fixtures. *Holmes v. Kemper*, 20 Johns. 28. So in England, a building upon a brick foundation let into the ground with a chimney belonging to it. *Penton v. Robart*, 2 East, 88. So in Washington, a wooden dwelling house two stories high in front, with a shed of one story, upon a cellar of stone or brick foundation and a brick chimney. *Van Ness v. Packard*, 2 Peters, U. S., 137; see also *Wall v. Hinds*, 4

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Gray, 256; *Wells v. Barmeister*, 4 Mass. 514; *Raymond v. White*, 7 Cowen, 319; *Eleves v. Marr*, 3 East, 34.

These cases, though perhaps formally based upon some expressly stated reason, not including the united elements of the rule quoted, will yet be found upon thorough examination to have their logical basis thereon, as in the facts of each there is shown a want of the united elements necessary to work the change from chattel to fixture; and in them will be found full warrant for saying that the finding of the district court in this case was incorrect, and that the property in question never became in the strict and proper sense of the word, fixtures. The machinery was annexed to an appurtenance to the realty, but so that it might be removed without serious damage thereto. It had no special appropriation to that portion of the realty with which it was connected. The intention of the party making the annexation as declared and as naturally to be inferred: "the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made," can be accomplished only by considering and treating the machinery precisely as it was treated by the defendants, as chattel property.

Judge Bartley says, with reference to the rule quoted: "This criterion furnishes a test of general and uniform application; one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many of the cases, but it is believed to be at variance with the conclusion in but few of the well considered adjudications. Adopting this as the criterion, there will be found no occasion for giving an ambiguous meaning to the term fixtures; no occasion for denominating an article a fixture at one period of time, which with the same annexation would not be such at another period; no occasion for determining that to be a fixture as between vendor and vendee, which under like circumstances of annexation would not be such as between landlord and tenant; or finding that to be a fixture as

between heir and executor which under like circumstances of annexation would not be such as between tenant for life and remainder man or reversioner. *Sturges v. Warren*, 11 Vermont Rep. 433. It is true, the time of the annexation and the relation and situation of the parties may constitute very important considerations in ascertaining the intention and object of making the annexation.

Why is a tenant for life, or for years, or at will, favored with the right of removing articles which he attaches to the land during his term? The Supreme Court of Massachusetts say, in *Whiting v. Brastow*, 4 Pick. 311: "There seems to be no doubt that, according to the later decisions in England, and several cases in our own books, a tenant for life, for years, or at will, may, at the expiration of his estate, remove from the freehold all such improvements as were erected or placed there by him, the removal of which will not injure the premises, or put them in a worse plight than they were when he took possession." All that is required of a tenant is, to leave the land in as good condition as it was when he received it. When, therefore, a tenant erects expensive structures for carrying on his trade or business, which can be removed without their destruction, or material injury to the freehold, the presumption is a rational one, that it was not the intention of the tenant to make them permanent accessories to the freehold, and thereby donations to the owner of it. The *intention* of the tenant, clearly inferable from his situation and relation to the landlord, is the real foundation of the right of removal with which he has been favored. It is true, other reasons of great subtlety and considerations of public policy have been frequently assigned for this right of removal; but they are doubtless attributable in some degree to a laudable desire on the part of the courts to carry out the real intention of the party. It is said that the right of removal must be exercised by the tenant before the expiration of his term, or in some cases within a reasonable time afterwards; that the tenant can remove things which he has attached to the land for the purposes of trade or manufacture, when not contrary to some prevailing custom, or where it can be done without material and essential injury to the freehold, or where the erections in themselves were strictly chattels in their nature before they were put up, and can be removed without being entirely

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demolished, or losing their essential character or value. Amos & Ferand on Fixtures, 40 and 44. All these circumstances furnish considerations bearing upon the intention of the tenant in making the erections, and their temporary nature and want of adaptation to the permanent use and enjoyment of the freehold, and show the application of the criterion here adopted."

Whether the facts of this case be tested by the broad and logical theory of the rule announced in *Teaff v. Hewitt*, or be treated under the more narrow construction applied to trade-fixtures, still the result is the same. Such fixtures might properly be removed within the term of a tenant at will, or within a reasonable time after the termination thereof. *Doty v. Gorham*, 5 Pick. 487; *Rising v. Stannard*, 17 Mass. 282; *Whitney v. Brastow*, 4 Pick. 310; *Davis v. Thompson*, 13 Me. 209; *Ellis v. Paige*, 1 Pick. 43.

The first and third of the decisions last cited are criticised in *White v. Arnold*, 1 Wharton, 91, but it is difficult to see upon what principle a tenant at will could be denied a reasonable time after the termination of his tenancy to take away whatever he would rightfully have been entitled to remove during his term, had he been a tenant for any specific period. The law may raise a presumption against such last-named tenant, if he does not remove his fixtures, that he intends to leave them for the benefit of the estate; and it is upon such theory only that the landlord holds: but no such presumption arises in the case of the tenant at will, as he cannot know in advance the termination of his tenancy, and therefore cannot know when to remove; and must always be open to this baseless presumption unless he is to be allowed a reasonable time after such termination to remove.

In *Penton v. Robart*, however, this right of the tenant was extended to one actually in possession after lease expired, against whom a judgment in ejectment had been obtained; and the verdict was for the plaintiff landlord, as to trespass in breaking and entering, damages one shilling: and for the defendant tenant, as to the rest of the trespass. This case, it is claimed, is shaken, so as it would authorize a tenant thus holding over to remove fixtures but it is upheld in *Holmes v. Tremper*, cited above; the court saying: "And when it is said that the removal must be within

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term, or else he will be a trespasser, it means only a trespasser as regards the entry"; and such would seem to be the logical sequence of the rule for the protection of tenants. However that may be, it is not necessary to rely upon any extreme decision in this case, for, even if not entitled to notice to quit before they could be held trespassers, on which point no opinion is here expressed, still defendants were rightfully holding until their estate was determined. Accepting the view most strongly against the defendants, there is nothing in the facts of the case from which such termination can be gathered, prior to the act of the state in giving to plaintiff a patent, upon the twenty-seventh day of October, 1869; and upon the eighteenth of the next month the property was removed, certainly not any unreasonable time, upon the facts of the record. So, whether the machinery be held to be chattel property, or trade fixtures, in either case the defendants had the right to remove it. The patent of the state of Nevada consequently could not pass the property to respondent.

Holding these views, I dissent from the opinion of the majority of the court.

THE STATE OF NEVADA, RESPONDENT, v. ULYSSES W. HUTCHINSON, APPELLANT.

CRIMINAL LAW—RECOMMENDATION BY JURY TO FULL EXTENT OF PUNISHMENT.

Where the jury in a criminal case rendered a verdict for manslaughter, and recommended that defendant should receive the full extent of punishment allowed by law for that crime; and it was objected that such verdict showed on its face that the jury was prejudiced to defendant's injury: *Held*, that such recommendation did no injury, unless it could be shown that the court was influenced thereby.

INSTRUCTION IN MURDER CASE THAT CERTAIN FACTS WOULD NOT AMOUNT TO MORE THAN MANSLAUGHTER. Where in a murder trial, in which the verdict was manslaughter, the court in its charge set forth the law bearing upon the case in all its possible phases, and also gave an instruction, that "if defendant and deceased were engaged in a violent struggle, in which deceased repeatedly struck defendant on the head with a champagne bottle, and that deceased made the first assault in retaliation of offensive and insulting language, such struggle and striking of defendant would be deemed sufficient provocation to excite an irresistible passion in a reasoning being; and if such passion was actually

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excited in defendant, and no interval occurred sufficient for the voice of reason and humanity to be heard, but immediately, and without malice or revenge and simply in obedience to such sudden violent impulse of passion, defendant stabbed and killed deceased, such killing would not amount to more than manslaughter"; and it was objected that the instruction led to the verdict manslaughter: *Held*, that the objection was not valid, and that there was error.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

Defendant was indicted for the murder of John F. Glenn committed on June 10th, 1870, in a saloon in Hamilton, White Pine County. The deceased was a porter in the saloon, and appeared to have been carrying out a box of empty bottles, and repeatedly asked defendant, who was sitting there, to get up or get out of his way. Defendant refused, and deceased removed or attempted to remove him; and, upon his replying with abusive and obscene language, deceased struck him with a bottle; and in the scuffle which ensued defendant inflicted the fatal blow with a knife.

The trial took place in July, 1870, and defendant being convicted of manslaughter was sentenced to the state prison for ten years.

Among the instructions asked by defendant and given by the court, to which reference is made in the opinion, were the following.

"If the jury believe from the evidence that the deceased made an attack upon defendant, and that the assault was so sudden, fierce and violent that a retreat would only increase his danger, then defendant had the right to kill deceased without retreating at any time, provided the assault was of such a character as to induce a reasonable man to believe that he was in danger of his life or of receiving great bodily injury."

"If the jury believe from the evidence that the defendant at the time the fatal blow was given had reasonable ground to apprehend danger to his life or great bodily harm, he had a right to defend himself, even to the taking of the life of his assailant, whether there was actual danger or not."

"If the jury believe from the evidence that the defendant at the time the fatal blow was given had reasonable ground to apprehend

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danger to his life or great bodily injury, and acted under that belief and not a spirit of revenge, he should be acquitted.”

“No words of reproof, however grievous, insulting and vile, will justify an assault upon the person; and if the jury believe from the evidence that the defendant did use vulgar and approbrious epithets toward Glennen, this would not justify any assault made by Glennen; and if such an assault was made in such a manner as to induce the defendant as a reasonable man to believe that Glennen intended to inflict upon his person great bodily harm; that after such assault was made, defendant in good faith endeavored to avoid the struggle but was unable so to do, and that defendant gave the blow with the knife under the belief that it was necessary for him so to do in order to save his life or to prevent great bodily harm upon his person, then defendant would be justified in using the knife, and the jury should acquit.”

H. I. Thornton, for Appellant.

I. The verdict was contrary to the evidence. It was a clear case of justifiable homicide.

II. The jurors knew that their province ended with the return of guilty of manslaughter; but they invaded the province of the court in pursuit of the defendant. Not satisfied with discharging their duty, they seek to influence the court in its duty—not satisfied with convicting the defendant, they ask the court to inflict the highest punishment. This shows bias and prejudice, which was evidently inconsistent with a fair and impartial verdict.

III. The instruction as to what “would not amount to more than manslaughter,” led to the verdict of manslaughter, while the circumstances stated should have led conclusively to a verdict of justifiable homicide.

L. A. Buckner, Attorney General, for Respondent.

I. The evidence clearly proved defendant guilty of murder.

II. The jury were evidently in doubt whether they should not find defendant guilty of murder in the second degree, and hence the recommendation in the verdict that the punishment should be

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for the longest term for which he could be sentenced, considering that they could not, under the instruction of the court, convict him of a higher crime than manslaughter.

III. If there was any error in the instruction, it was against the state.

By WHITMAN, J. :

The appellant was indicted for murder, and convicted of manslaughter. It is objected that the verdict is contrary to the evidence. In that there is conflict; and if it were permitted to review and weigh the evidence in a criminal case—which is yet an undecided point in this court—still in the case of a substantial conflict, the verdict of the jury would not be disturbed.

It is urged that the verdict upon its face shows that the jury was prejudiced to appellant's injury. This is the verdict: "We the jury in the above-entitled case, find the defendant guilty of manslaughter, with the recommendation to the court that the defendant receive the full extent of punishment allowed by the law for this crime." That this latter clause of the verdict is an attempted invasion of the powers of the court is evident; but it is and must be, without injury, unless it is shown that the court was influenced thereby, which is not pretended. It is not unusual for juries to express opinions somewhat beyond their powers, but though irregular, it is in most cases, as here, rather a harmless eccentricity.

It is claimed by appellant that the court erred in charging the jury thus: "If the defendant and deceased were engaged in violent struggle, in which the deceased repeatedly struck the defendant upon the head with a champagne bottle—that the deceased had made the first assault upon defendant in retaliation of offensive and insulting language, such struggle and striking of defendant would be deemed a sufficient provocation in law to excite an irresistible passion in a reasonable being; and if the jury believe that such an irresistible passion was actually excited in the breast of defendant—that no interval occurred for the voice of reason and humanity to be heard, and that immediately, without malice or revenge, and simply in obedience to such sudden, violent impulse of

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passion, he stabbed Glennon and killed him, such killing would not amount to more than manslaughter." Upon this, counsel for appellant argues: "The instruction leads to a verdict of manslaughter, when the premises given should lead conclusively to a verdict of justifiable homicide."

The instruction complained of in nowise leads to a conviction of manslaughter. It simply withdraws from the jury all considerations as to whether any crime had been committed by the defendant greater than that of manslaughter. Whether he was guilty of that offense or not was clearly left for them to determine. There is no statement in it, that the jury would be justified in finding the defendant guilty of manslaughter or any other crime. So it was held respecting a similar instruction in the case of the *State of Nevada v. William Little*, 6 Nev. 281.

The judgment must be affirmed; also the order denying a new trial. It is so ordered.

GARBER, J. having been of counsel, did not participate in the foregoing decision.

THE STATE OF NEVADA, RESPONDENT, v. E. B. PARSONS
et als., APPELLANTS.

CRIMINAL LAW — TESTIMONY IN ABSENCE OF JUROR. Where a portion of the testimony of a witness for prosecution in a criminal case was given during the absence of a juror, but it appeared that such testimony was immaterial and that it was repeated to the twelve jurors as soon as the court's attention was called to the fact: *Held*, that the irregularity could not operate to defendant's detriment, and was not sufficient to reverse the judgment.

IRREGULARITY WHICH MIGHT BE PREJUDICIAL. On appeal from a conviction in a criminal case, any irregularity which *might* have affected the verdict will throw upon the state the burden of showing that it was not and could not have been prejudicial to defendant.

ABSENCE OF JUROR — PRESUMPTION OF REGULARITY. Where the record in a criminal case showed that while a witness was giving some immaterial testimony, a juror, who had been absent, came into court: *Held*, that the presumption was, until the contrary appeared, that the juror was absent by the permission of the court and in charge of its officer.

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AUTHENTICATION OF AFFIDAVITS FOR NEW TRIAL. Where affidavits in reference to certain remarks by the court below on a criminal trial were copied into bill of exceptions; but there was nothing to show that they had been filed and used on the motion for a new trial: *Held*, that the Supreme Court, on appeal, could not regard them.

NO INQUIRY AS TO INSUFFICIENCY OF EVIDENCE WHERE RECORD DEFECTIVE. Supreme Court will not consider an objection on a criminal appeal that a verdict was not justified by the evidence, if the bill of exceptions and statement fail to show affirmatively that they contain all the evidence tending to prove the facts, as to which an insufficiency of evidence is alleged.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The appellants, E. B. Parsons, Tilton Cockerell and John Squires, together with A. J. Davis, J. C. Roberts, James Gilchrist, R. A. Jones and J. E. Chapman, were indicted at the November term, 1870, of the District Court for Washoe County, for the crime of robbing Frank C. Minshull, express messenger of Wells, Fargo & Co., of \$41,435. Upon arraignment, Jones pleaded guilty, and afterwards Davis did the same. The appellants first demurred to the indictment, as did also Chapman, and after demurrer overruled, pleaded not guilty. Being tried and convicted, they were sentenced to the State Prison, at hard labor; Parsons for the term of twenty years, Cockerell for the term of twenty-two years, and Squires for the term of twenty-three and a half years.

Wm. Webster, for Appellants.

After arguing the demurrer at some length, counsel made the following points:

I. One of the most sacred rights given an accused is to have a full and impartial jury when evidence is being given. This right may be said to be mandatory. If it were merely directory, there would no doubt devolve upon the appellants to show affirmatively that their cause had been prejudiced by the irregularity; but in this case no such requirement can be made. 3 Cowen, 355; Graham & W. on New Trials, 375, Note 1.

II. The evidence does not sustain the indictment. Defendants in the first count are charged with taking the moneys of "Wells, Fargo & Co."

Fargo & Company," from Frank C. Minshull; in the second count they are charged with taking the moneys of Frank C. Minshull, bailee of "Wells, Fargo & Company"; on the trial it is shown that the moneys of neither were taken, but those of "Wells, Fargo & Co.," which is different from "Wells, Fargo & Company."

III. Counsel also referred to the affidavits in the bill of exceptions, which, however, were not properly authenticated, and discussed the evidence at length, claiming that it was insufficient to justify the verdict.

L. A. Buckner, Attorney General, and *Robert M. Clarke*, for Respondent.

I. The objection that Gilchrist delivered testimony in the absence of one of the jurors is bad for two reasons; the testimony so delivered was unimportant and immaterial, especially as to the defense, and it was repeated after the juror's return. This excludes all possibility of injury. The presumption is, that the juror was in charge of a sworn officer. Misconduct will not be presumed.

II. The objection to oral statements alleged to have been made by the judge in denying Chapman's motion for dismissal cannot be considered here, and is not well taken if considered, because the falsity of the words alleged is exposed by the judge's certificate; and because the words used were not used with reference to these defendants, nor either of them, but to Chapman, who does not complain. They were a statement, not to the jury, but to counsel. It was an opinion pronounced against Chapman upon his motion, rendered imperative by the application to dismiss him from the indictment. The court was compelled to decide whether the evidence was or was not sufficient to put Chapman on his defense; but his guilt or innocence had nothing to do with the guilt or innocence of these defendants.

By the Court, GARBNER, J. :

The first point made by appellants is, that the indictment charges more than one offence. The same question, on the same indictment, was made and disposed of in *State v. Chapman*, 6 Nev. 325.

It is assigned for error, that a portion of the testimony of Gilchrist, a witness for the prosecution, was given during the absence of one of the jurors. But it clearly appears from the record, that the testimony so given was immaterial, and that, as soon as the attention of the court was called to the fact of the absence of the juror, the same testimony was repeated to the twelve jurors. It is therefore evident that the irregularity complained of could not possibly have operated to the detriment of the appellants. The argument of counsel is directed to the fact of the absence of the juror, rather than to the reception of testimony by the other members of the jury during his absence. In order to preserve them from any outside influence, the jurors sworn to try an indictment for felony, when not in court, should be kept in charge of the sworn officers of the court. Doubtless, a showing of exposure to improper influence, such as separating unattended by an officer, under circumstances affording opportunity for tampering, corruption or the like— in other words, an irregularity which *might* have affected the verdict— would throw upon the state the burden of proving that the irregularity was not and could not have been prejudicial to the defendant. But this record discloses no such irregularity. All that appears is that, while the witness was testifying, one of the jurors who had been absent came into court. We think, until the defendants show the contrary, the fair presumption is that the juror was absent by the permission of the court and in charge of its officer.

The next assignment relates to the remarks made by the court in overruling the motion to discharge Chapman. We cannot regard the affidavits copied into the bill of exceptions. They do not appear to have been filed or used on the motion for a new trial. The certificate of the judge to the bill of exceptions is conclusive on us. From this it appears, that the remarks of the judge simply affirmed the making out of a *prima facie* case against Chapman. It is not pretended that this was error of which these appellants can complain.

The other errors assigned, and not disposed of in *State v. Chapman*, are founded upon the assumption that the evidence does not justify the verdict. We cannot consider them, for the reason that

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the bill of exceptions and the statement fail to show affirmatively **that** they contain all the evidence tending to prove the facts as to **which** a failure of proof is alleged. *Sherwood v. Sissa*, 5 Nev. 353; *Com. v. Merrill*, 14 Gray, (Mass.) 417.

The judgments and the orders appealed from are affirmed.

SAMUEL HAMER, RESPONDENT, v. JOHN KANE, APPELLANT.

NO INJUNCTION TO RESTRAIN EXECUTION RESTRAINABLE BY SIMPLE MOTION.

Where in an action for an injunction to restrain proceedings under a writ of execution issued by a justice of the peace in a certain tax suit commenced before him, and in which he had denied a motion to transfer to the district court, in accordance with Section 33 of the Act of March 9th, 1865, (Stats. 1864-5, 271) the complaint set forth the fact of an appeal from the judgment to the district court, but failed to allege any motion to either the justice or district court to stay the execution issued: *Held*, that as there was a plain, adequate and convenient remedy by simple motion in the original suit, no case for injunction was made out.

NO INJUNCTION WHERE MOTION AFFORDS REMEDY. As the remedy by injunction has always been denied when there is a plain, adequate and convenient remedy at law, upon analogous principle and stronger reason should it be desired when the end sought may be obtained by mere motion in an action pending.

JUSTICES' COURTS—STAY OF EXECUTION IN CASE OF APPEAL. In case of the due perfection of an appeal from a justice's court to a district court, the justice has the power to stay proceedings under an execution previously issued, and the district court to supersede or stay one issued after such appeal.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The tax suits, to restrain the executions in which this action was instituted, were brought in the justice's court for Pioche Township, Lincoln County; and the defendant was sheriff of that county.

L. A. Buckner, Attorney General, and *Thomas Wells*, for Appellant.

I. The bill sets forth no sufficient cause for the granting of an injunction. It shows that the judgments had been appealed from.

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When the appeals were perfected, if the sheriff had executions ~~the~~ justice would, no doubt, on demand, have issued a supersedeas; and if not, he could have been compelled to do it. So the parties had a plain, speedy and adequate remedy by their appeals. Practice Act, Sec. 585; 4 Cal. 177; 7 Cal. 276; 30 Cal. 325; 32 Cal. 265.

Pitzer & Corson and *G. S. Sawyer*, also for Appellant.

J. C. Foster and *W. W. Bishop*, for Respondent.

The object of the action is to restrain defendant from selling plaintiff's property until a test case is decided. The complaint shows that an appeal was taken and perfected, and a bond filed to stay execution; that afterwards the justice issued execution, and a sale was about to be made, which would create a cloud on the title of plaintiff. The object is to prevent the creation of this cloud, to stop and end great and onerous litigation and a multiplicity of trials.

Courts of equity often interfere with suits at law by injunction, for the purpose of preventing or stopping useless litigation. *Willard on Injunctions*, 273; *Woodruff v. Fisher*, 17 Barb. 224; *Crew Burnham*, 1 Black. 352; *Key v. Munsell*, 19 Iowa, 305; *May v. Golden*, 5 Ohio St. R. 361; *De Bauer v. The Mayor*, Barb. 392; *Von Schmidt v. Huntington*, 1 Cal. 55; *People v. Stratton*, 25 Cal. 244; *People v. Merrill*, 26 Cal. 337.

By the Court, LEWIS, C. J.:

Several actions were brought by the state in a justice's court, for the purpose of recovering taxes alleged to have been levied and assessed, but remaining unpaid. The defendant in each case appeared, answered and moved a transfer of the cases to the district court under Section 33, page 287, (Stats. of 1864-5) which declares that "if it appear on the trial of any action commenced in a justice court under the provisions of this act that the legality of any tax or assessment levied hereunder is involved therein, the justice shall immediately make an entry thereof in his docket, and cease all further proceedings in the case; and shall immediately certify and return to the district court of the county a transcript of all the entries made in his docket relating to the case, together with all the pro-

cess and other papers relating to the suit, in the same manner as an appeal. Thereupon the district court shall proceed in the case to final judgment and execution, the same as if the said suit had been originally commenced therein." The justice denied the motion, and rendered judgment in each case against the defendants respectively, from which an appeal was taken to the district court. But it appears execution was issued by the justice, and the defendants, apprehending a levy and sale of property thereunder, began this suit, for the purpose of obtaining an injunction restraining the defendant from proceeding under the writs. A general demurrer to the complaint was filed and overruled, and upon the defendant failing to answer, an injunction was issued, from which this appeal is taken.

The complaint does not state whether the executions were issued by the justice before appeals were taken or not, nor is there any showing that an effort has been made to have a stay of proceedings upon them by motion to the court issuing them, or the district court to which the appeals were taken. The injunction is sought to restrain any levy and sale under the executions until the determination of the appeals in the tax suits. Now the courts have always denied the remedy by injunction when there was a plain, adequate and convenient remedy at law. Upon analogous principles and stronger reason should it be denied when the end sought by it may be obtained by a mere motion in an action already pending.

But in this case, if the executions were issued by the justice before the bonds on appeal were given, then a motion should have been made before the justice, when filed, to stay further proceedings upon them. If issued afterward, the matter was under the control of the district court, and an application on motion of a similar character should have been made to that tribunal. If a bond, as required by the statute for the stay of execution, were given when the appeal was taken, it must be presumed the justice would at once order a stay of proceedings upon the executions previously issued by him upon mere suggestion. And so if issued afterward, undoubtedly the district court, which, after appeal, had complete jurisdiction of the case and control of the judgment, would have issued if not a supersedeas, at least an order staying

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proceedings, thus rendering a new suit and injunction entirely unnecessary. When the injunction is sought as auxiliary to an action already commenced, and the end to be obtained by it can be as completely accomplished by motion upon the clearest principles of equity practice, a new suit instituted simply for such injunction cannot be sustained. To allow it would be to encourage useless litigation and unnecessary expense. As the plaintiffs could have obtained complete relief and protection from the threatened injury by motion in the actions in which the appeals were taken, this suit was entirely unnecessary. These essential facts appearing by the complaint, the demurrer should have been sustained. The judgment below must therefore be reversed. It is so ordered.

PATRICK H. CLAYTON, APPELLANT, v. CHARLES N. HARRIS, RESPONDENT.

REGISTRY ALLEGIANCE OATH UNCONSTITUTIONAL. The oath required by Section 6 of the registry law, (Stats. 1869, 141) "being in terms in addition to the qualifications of an elector, which now are or hereafter may be prescribed by law," cannot be regarded as "a test of electoral qualification" within the meaning of the constitution, (Act II, Sec. 6) and is therefore unconstitutional.

LEGISLATIVE POWER AS TO RIGHT OF SUFFRAGE. The legislature can add no qualification as title to the right of suffrage to those prescribed by the constitution.

CONSTRUCTION OF ARTICLE II, SECTION 6, OF CONSTITUTION. Under Article II, Section 6, of the constitution, the legislature can prescribe what oath or oaths may be necessary as a test of electoral qualification, but it cannot impede or trammel the right of suffrage by adding new qualifications.

QUALIFICATIONS OF ELECTORS. Where it appeared, in a contested election case, that the successful candidate had been elected by votes of persons whose names had been put on the official register, though they had not taken the oath prescribed by the registry law, (Stats. 1869, 141): *Held*, that the oath could not be required, and that the votes were properly received.

APPEAL from the District Court of the Third Judicial District, Lyon County.

The facts are stated in the opinion of the court.

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Clarke & Wells, for Appellant.

The oath is not in violation of the constitution. It is not an additional qualification. It does not require the elector to have anything, to possess some physical, intellectual or moral attribute or quality: but to perform an act in every particular consistent with his conscience and duty. The distinction between having a qualification and doing an act in proof of it, is too apparent for discussion. The constitution and government of the United States in fact and law, parts of the constitution and government of the State of Nevada. Art. I, Sec. 2, Const. Nev.; Art. VI, Const. Nev. In legal effect, therefore, the oath simply requires the elector to support and defend the constitution and government of the State of Nevada. Has the sovereignty of the state fallen so low that it cannot require its citizen to take an oath of fealty to its constitution and government?

If our conclusions respecting the constitutionality of the oath are correct, we have left for consideration only the question, the fact that the elector's name was on the register at the time of voting conclusive of his right to vote? We say, No: "illegal voting" is a specific ground of contest. The question was not one that could not be passed upon by the registry agent judicially. The agent had no jurisdiction to determine it.

S. Mesick, for Respondent.

The oath prescribed by the registry law superadds a condition of voting not contemplated by the constitution, and not within the power of the legislature to prescribe.

Registration is no element of qualifications as an elector, but is only evidence of the right to vote. The persons whose names are on the register are entitled to had all the qualifications of voters, and their names are on the official register and the check list.

The oaths are not prescribed by the legislature as tests of qualification, but are made by their terms qualifications in addition to those prescribed by the constitution. Inasmuch as these oaths are conditions to the right of voting not contemplated by the constitution, they are void. *Davis v. McKeeby*, 5 Nev. 369.

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By the Court, WHITMAN, J. :

This case is an election contest for the office of district judge of the second judicial district. The election was held on the eighth day of November, 1870, and should have been conducted under the provisions of an act entitled "An act to provide for the registration of the names of electors, and to prevent fraud at elections," approved March 5th, 1869, so far as such were constitutional and valid.

The whole contest here is narrowed to one point: the correctness or otherwise of the action of the district court trying the cause, including certain evidence, which ruling is assigned as error. As concisely stated by counsel for appellant, the matter stands thus: "The appellant offered to prove that persons voted for respondent whose names had been put on the official register without such persons having taken the oath prescribed by Section 5, Act March 5th, 1869," entitled as above, "and also that enough such persons voted for respondent to elect him." To this offer respondent objected upon the grounds: 1. That the appearance of the voter's name on the official register was conclusive. 2. That the oath was unconstitutional.

This objection was sustained by the court, the evidence excluded, and final judgment entered for respondent—whence this appeal.

The section of the act referred to, so far as it is in present point, reads thus: "Section 5. In addition to the qualifications of elector, which now are or hereafter may be prescribed by law, every person applying to be registered shall, before he shall be entitled to have his name registered, take and subscribe the following oath or affirmation, which shall be administered by the registry agent:

* * * I do solemnly swear (or affirm) that I will support, protect and defend the constitution and government of the United States against all enemies, either domestic or foreign, and that I will bear true faith, allegiance and loyalty thereto, any ordinance, resolution or law of any state or territory to the contrary notwithstanding." * * *

The constitution of this state establishes the qualifications of voters, provides that they shall be registered, and "for the ascertainment by proper proofs of the persons who shall be entitled

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the right of suffrage, as hereby established, to preserve the purity of elections and to regulate the manner of holding and making returns of the same ; and the legislature shall have power to prescribe by law any other or further rules or oaths as may be deemed necessary as a test of electoral qualification." Const. Art. II, Sec. 6. If, then, the portion of the oath quoted be prescribed as a "test of electoral qualification" it must stand, however unlikely so to act, as the legislature is the judge of what oath or oaths may be necessary as such test. But the legislature has said that this oath shall be taken "in addition to the qualifications of an elector which now are or hereafter may be prescribed by law." The natural interpretation of this language is that the oath is not applied as a test of electoral qualification, but as a qualification in addition to those already prescribed, or hereafter to be prescribed. Here the legislature exceeded its power ; it can add no qualifications as title to the right of suffrage, to those prescribed by the constitution.

This is substantially admitted by appellant's counsel ; but he contends that this oath is no new qualification, but that the taking thereof is simply doing an act in proof of such qualification. This position is opposed to the legislative declaration, if its language has been properly interpreted above ; but aside from that, it is difficult to see how the solemn sworn promise of a party as to his future action could possibly be proof of residence, citizenship or any other fact prescribed by the constitution as precedent to the right of suffrage. As has been suggested, probably the adaptability of such proof, its fitness or unfitness to accomplish the object sought, could not be inquired into had the legislature indicated its opinion that the oath was necessary for such purpose ; but when the legislature, instead of so doing, has named it as an additional qualification, and when it is evident that no one could truthfully take such oath without the existence of a certain positive mental condition which, although laudable, is not made a constitutional prerequisite to the exercise of the right of suffrage, it follows that it must be deemed as by the legislature declared, an additional qualification. The legislature in effect says to the person possessing all qualifications entitling him to registration and to vote, "you shall not occupy your rightful position as defined by the constitution, unless you, in

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addition, promise for all future time to conduct yourself in a certain manner, and such promise so to act shall be and is a qualification precedent to voting."

This is unconstitutional; the right of suffrage cannot be impeded or trammelled, save so far as the legislature may deem necessary as a test of electoral qualification.

The ruling of the district court was therefore right upon the second specification of objection.

This conclusion renders it unnecessary to examine the first. The judgment is affirmed.

GARBER, J., did not participate in the foregoing decision.

J. N. WILLIAMS, v. H. J. BIDLEMAN.

LEFFINGWELL RELIEF ACT UNCONSTITUTIONAL. The Act of February 16th, 1871, directing the issuance and payment of county warrants for the relief of James Leffingwell, (Stats. 1871, 57) is a special law regulating county business, and therefore in violation of Art. IV, Sec. 20, of the Constitution.

CONSTRUCTION OF ARTICLE IV, SECTION 20, OF THE CONSTITUTION. Under the constitutional provision against the passage of local or special laws regulating county or township business, (Art. IV, Sec. 20): *Held*, that a special law auditing and allowing a preëxisting claim against a county, appointing the mode and manner of its payment, directing the drawing of county warrants and fixing the rate of interest they should bear, was unconstitutional.

LAWS IN REFERENCE TO COUNTY LIABILITIES. A law fixing the liability of a county is a condition precedent to the exaction of payment from the county.

LOCAL MANAGEMENT OF LOCAL AFFAIRS. The policy of the constitution is local management of local affairs, regulated by general laws of uniform application throughout the state.

APPLICATION OF STATUTE REGULATING COUNTY BUSINESS. Whether the legislature can or cannot convert a moral obligation into a legal demand against a county, or fix a salary or compensation of a county officer by special enactment, it clearly has no power by a special act to repeal the general law regulating county business, (Stats. 1864-5, 257) or dispense with its provisions in favor of a particular person, leaving it in force as to all others.

ALLOWANCE OF CLAIMS AGAINST COUNTIES. The fact that the board of commissioners of a county has no power under the general law to examine or allow any account against the county except such as is legally chargeable against it, does not authorize the passage of a special law directing the allowance and payment of an account which could not be allowed under the general law.

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APPLICATION to the Supreme Court for a writ of mandamus requiring the defendant, as recorder and ex-officio auditor of Lander County, to issue and deliver the warrants referred to in the act copied in the opinion. The defendant, in answer to the petition, set up the unconstitutionality of the act.

Clarke & Wells, for Relator.

I. The act in constitutional contemplation does not "regulate county business," but simply declares that in the judgment of the legislature Lander County ought to pay Leffingwell a certain sum of money, for the payment of which there was, without this act, no authority of law, mode of payment, or means of compulsion. A general law was not only unnecessary, but would have been absolutely inapplicable, if not impracticable. The legislature is not inhibited from giving individual relief. It thought Leffingwell ought to be paid, and knew he could not be without legislative prescription of authority and mode. The constitution does not prohibit necessary special legislation, when general will not cover the case.

II. Leffingwell's claims were validated by the act, which also provided a mode of payment, which mode takes the matter out of the operation of any previous act, and repeals all former laws bearing upon the question so far as in conflict with its provisions. It was a case the necessities of which could be judged of only by the legislature.

George S. Hupp, for Defendant.

I. The act is in violation of Art. IV, Sec. 20, of the constitution, and therefore void. The legislature could not in disregard of the constitutional prohibition interfere with the *local* and *special business* of Lander County, and command her to draw money from her treasury, and pay it to one of her former officers, upon a state of facts of which her own commissioners had exclusive original jurisdiction.

II. There is a general law providing for the allowance and payment of claims against counties, which is of uniform application throughout all the counties of the state. The Leffingwell act un-

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dertakes to repeal this law, so far as the same relates to the county of Lander. It will not be contended that there is any difference between repealing a general law already existing, so far as the same relates to a single county, and enacting a new law, which, by its express provisions, is restricted in its operation to a single county.

By the Court, GARBER, J. :

By an act of the legislature of this state, entitled "An act for the relief of James Leffingwell, Sheriff of Lander County, in the years 1865 and 1866," approved February 16th, 1871, it is enacted as follows :

"SECTION 1. The county auditor of Lander County is hereby authorized and directed, and it is made his special duty, from and after the passage of this act, to draw his warrants in favor of James Leffingwell, for the sum of three thousand five hundred dollars, from the general fund of said Lander County, which warrants shall bear a legal interest from the date of their issuance ; and said warrants shall be in any sum not less than one hundred, or more than one thousand dollars.

"SEC. 2. It is hereby made the duty of the county treasurer of said county to pay said warrants on their presentation, in the regular order of payment, at the said treasurer's office, in the county of Lander, state of Nevada, in gold coin.

"SEC. 3. All acts or parts of acts that are inconsistent with the provisions of this act, are hereby repealed, so far as the same may relate to the county of Lander."

The plaintiff, as assignee of Leffingwell, makes this application for a *mandamus*, to compel the defendant to perform the duty then enjoined upon him. The defendant contends that the statute is unconstitutional, as in violation of Section 20 of Article IV of the constitution of Nevada, which declares, among other things, that "the legislature shall not pass local or special laws regulating county and township business." The law in question is clearly a special law—an exception rather than a rule. This was properly conceded by counsel for plaintiff; who contend, however, that as the statute does not provide for the transaction of *general* county business, ■

only for a special case and emergency, it is not a regulation of business within the meaning of the constitution. But we think this statute is clearly a regulation of business. Any law prescribing a rule to govern business, or an order or direction for its management, is a regulation of that business, whether it be a limited and temporary law intended to secure a particular end or object, or a general and permanent law, according to the provisions of which all county affairs are to be conducted. The manifest purpose and direct consequence of this statute is to transfer to Leffingwell a portion of the county funds of Lander County. It is further evident that the money, when so paid to him, is to be his own private property; to be held and enjoyed by him absolutely, and for his own private ends and purposes. The act is purely retrospective in its operation; not enacted to provide a salary for services to be thereafter performed, or to make compensation for benefits thereafter to accrue; but to appropriate money, either as a gratuity or donation, or in discharge of some obligation already resting upon the county or upon the state. Now the legislature had no power to appropriate to a creditor or to a donee of the state, money raised by a tax levied upon and collected from the taxpayers of Lander County alone. No such tax could be legally levied or collected, except for purposes both public and of especial and peculiar interest to the inhabitants of that particular county. The fund thus raised for and dedicated to public and county uses could not be afterwards diverted to private or state purposes. The taxing power cannot be enlarged by such indirection. The validity of the statute must then rest upon the assumption that it applies the funds of Lander County in liquidation of a just or equitable claim against that county. Upon any other hypothesis it diverts such funds to a private purpose, or imposes upon one county the whole of a state burden.

Then we have a special law, auditing and allowing a preëxisting claim against a county; appointing the mode and manner of its payment; directing the drawing of county warrants and fixing the rate of interest they shall bear—appropriating county funds to county purposes. Is not this regulating county business? If it is not, we cannot imagine what would be so considered, or what possible effect is to be given to the clause of the constitution in ques-

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tion. We need not determine whether the obligation of the county to pay this money to Leffingwell was legal, or merely equitable or moral. In either view, the auditing and payment of his claim was essentially and inherently county business, as pertaining to a bond concerning the county peculiarly, rather than the whole state or any other subdivision of the state. It was county business within the ordinary and natural meaning of the phrase, as obviously, as the examination of a claim against the state by the State Board of Examiners, is state business.

Moreover, the legislature could not order the county to pay to Leffingwell a claim of moral and imperfect obligation only, without first, in express terms, or by necessary implication, converting the claim into a legal demand. In other words, a law fixing the liability of the county is a condition precedent to the exaction of payment from the county.

The policy of the constitution is local management of local affairs, regulated by general laws of uniform operation throughout the state. The first legislature assembled under the constitution, carrying out this policy, passed a general law regulating county business, and especially prescribing rules for the auditing and payment of claims against counties. This statute was evidently intended to control the settlement of all claims and demands payable by the county or out of the county treasury; as well debts of moral or honorary obligation only in their inception, but afterwards sanctioned and made valid by the law-making power, as those contracted under the authority of an existing law.

It may be that the legislature has the power to convert a moral obligation into a legal demand against a county, or to fix the salary or compensation of county officers, either by general or special prospective or retrospective enactment. We assume that such the law only for the purposes of this case. But whatever the nature of Leffingwell's claim, it is clear that the legislature had power, by a special law, to repeal the general law regulating county business, or to dispense with its provisions in his favor, leaving it force as to all other persons. If, for instance, the claim was for services rendered, the legislature could not compel the auditor to issue these warrants by a special statute dispensing with a finding

that the services were in fact rendered ; that the claim exceeded **the** indebtedness of the claimant to the county ; that his account **as** an officer having the collection, etc., of public funds had been **passed** ; that he had not neglected or refused, on proper requisition, **to** perform any of his official duties ; that there was money in the **fund** drawn upon to pay the warrant, etc., etc. A finding of these **facts** by the proper county officials is made, by the general statute, **a** prerequisite to the approval of all demands and the signing of all **warrants**. A compliance with the general statute, in this respect, **is** no less essential to the protection of the interests of the county, **when** the compensation for the services is fixed by law after, than **when** it is fixed before their rendition ; and there is as little propriety in or necessity for an assumption by the legislature of jurisdiction to investigate and determine these facts in the one case, as in the other.

Counsel for plaintiff say that " the statute validated the claim *and also* provided a mode of payment." They contend that the legislature could do this, because the claim was not for fees fixed by the Act of 1864-5, and that therefore, as the board could not allow it, the general statute did not apply. It is true that the general statute only gives the board power and jurisdiction to examine and allow accounts legally chargeable against the county. But **this** only proves that until, by constitutional enactment, the claim **was** made legally chargeable against the county, the board could not allow it ; not that, when so legalized, it could be paid without being audited and allowed like any other valid claim.

We conclude that this is a special statute, regulating business **which** is not only county business in its nature and quality, but **which** had been by the law imposed upon and committed to the county, as a duty to be by it performed through the action of its **local** officials. The prayer of the applicant is therefore denied.

WHITMAN, J., did not participate in the foregoing decision.

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

STATE OF NEVADA,

OCTOBER TERM, 1871.

▶ **BERT M. CLARKE *et al.*, RESPONDENTS, v. LYON COUNTY,**
APPELLANT.

▶ **EMPLOYMENT OF EXTRA COUNSEL FOR COUNTY BUSINESS BY DISTRICT ATTORNEY.**

In a suit by attorneys against a county, for services rendered such county, on an alleged employment made by the district attorney—the claim being based upon an alleged ratification by the county commissioners of the contract of employment—defendant asked an instruction, that, if plaintiffs presented their claim for \$5,000 to the commissioners, and they approved it for \$400 only of such claim, such approval of part did not in itself alone constitute a ratification of any agreement or contract made by the district attorney; and such instruction was refused: *Held*, error.

▶ **RATIFICATION OF UNAUTHORIZED CONTRACT BY PARTIAL ALLOWANCE.** Where attorneys presented a claim for \$5,000, for services rendered a county, to the county commissioners, who allowed it only to the extent of \$400; and there was no pretense of any direct contract with such commissioners, and no proof that they knew the claim was made upon an alleged contract of employment for the county by the district attorney, and no proof of any contract with the district attorney: *Held*, that such partial allowance would not constitute a ratification of any such contract.

▶ **RATIFICATION OF CONTRACT WITHOUT KNOWLEDGE OF IT.** No act will amount to a ratification of an unauthorized contract, unless the person charged with

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the ratification is cognizant of all the material features of it; and especial must he have a knowledge of the existence or execution of the contract itse.

RATIFICATION EQUIVALENT TO EXECUTION OF CONTRACT. As ratification is aft all but the execution of a contract on the part of the person ratifying, su ratification, to be effective, must be done understandingly.

BURDEN OF PROOF ON PLAINTIFF RELYING ON RATIFICATION. Where a plaint relies for a recovery upon ratification by defendant of an unauthorized co tract, it is incumbent upon him to prove that defendant knew of the contra and not upon defendant to establish the negative.

PLEA OF TENDER OF SMALLER SUM NOT AN ADMISSION. Where, in an action attorneys against a county, to recover \$5,000 for services performed for under an unauthorized contract made by the district attorney, defendant n denied any employment, and also pleaded that the services were worth on \$400, which it tendered and brought into court: *Held*, that, though under n old common law practice, such plea of tender might have carried with it implied admission of the employment, it was not so under the practice n which allows a defendant to plead as many defenses as he may have, and p provides that all the allegations of a pleading shall be liberally construed, wit view to substantial justice.

PLEADING—GENERAL DENIAL AND TENDER OF SMALLER SUM. There is no st absolute repugnance between a denial of an alleged employment and an o to pay a smaller sum than that claimed, as to prevent them both being plea in the same answer.

TENDER OF SMALLER SUM NOT AN ADMISSION OF INDEBTEDNESS. A tender o smaller sum than that claimed is not a necessary admission that any sum legally due.

PRACTICE ON APPEAL—POINT NOT MADE BELOW. Where, in a suit on an u thorized contract for services at a certain sum, claimed to have been su quently ratified, defendant, in addition to a general denial, pleaded that services were only worth a much smaller sum, which he tendered; and on trial there was no claim that such plea of tender was any admission of contract: *Held*, that such point could not be made for the first time in Supreme Court, for the reason that there was there no opportunity to am which defendant would have had if the point had been made below.

ADMISSIONS BY IMPLICATION—AMENDMENTS. If advantage is to be claimed o liance placed upon an admission in a pleading which results solely from n struction or implication, and where, as a consequence, the pleader ma misled to his injury, it must be done before the opportunity for amendr has passed.

APPEAL from the District Court of the Second Judicial Distr Ormsby County.

The plaintiffs, Robert M. Clarke and Thomas Wells, compo the law firm of Clarke & Wells. The verdict and judgment

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their favor was for \$4,500. The material facts are fully set forth in the opinion.

Mitchell & Stone, for Appellants.

I. The refusal to give the instruction asked by defendant was error. The testimony showed that no contract was made by the defendant with plaintiffs for the performance of the services mentioned in the complaint; and the evidence did not show any ratification by the commissioners of the pretended employment of plaintiffs by the district attorney. *Lyon v. Jerome*, 26 Wend. 494; *Treichler v. Berks County*, 2 Grant's Cases, 445; *The Board of Commissioners of Huntington County v. Boyle*, 9 Indiana, 297; *Yellow Jacket Silver Mining Co. v. Stevenson*, 5 Nev. 229.

II. The plea of tender in defendant's answer does not preclude it from relying upon the defense that no contract was made with plaintiff. Practice Act, Sec. 49; *Klink v. Cohen*, 13 Cal. 625; *Uridias v. Morrill*, 25 Cal. 36.

A. C. Ellis, for Respondent.

I. A county may ratify a contract of an unauthorized agent made in its behalf, the contract being one which the county could make in the first instance. *People v. Smith*, 31 Cal. 26; 4 Nev. 20; 5 Nev. 224; 26 Wend. 225. The action of the commissioners in permitting the plaintiffs to appear and defend for the county, in accepting the fruits of the suit, and in allowing in part the demand, amounted to a ratification of the district attorney's employment of plaintiffs. Story on Agency, Sec. 252 et seq.; 1 Parsons' Contracts, 47; 2 Parsons' Contracts, 118; Story on Contracts, Sec. 72. The ratification of a contract in part ratifies the whole. Story's Agency, Sec. 250.

II. The defendant's answer of tender, and the bringing into court of the sum allowed, cuts off all the defense except as to the value of the services, and estops the defendant from denying the employment. 2 Parsons' Contracts, 150, note; 5 Pick. 285; 7 John. 315; 6 Pick. 340; 2 Wend. 431; 1 Tidd's Practice, 625.

III. If the record discloses a ratification of the employment or

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evidence tending to prove such ratification, (for this court cannot weigh the testimony) there is left no question except the power of the commissioners to employ counsel, and the value of the services rendered.

By the Court, LEWIS, C. J.:

This action was brought by the plaintiffs to recover the sum of five thousand dollars for legal services claimed to have been rendered for the defendant under these circumstances: A suit being instituted in this court against the county to enforce the issuance of its bonds to the Virginia and Truckee Railroad Company, to the extent of twenty-five thousand dollars, the district attorney of the county engaged the plaintiffs to assist him in the defense, which they accordingly did. Subsequently, a claim was presented to the county commissioners for the sum of five thousand dollars for the services so rendered, but they allowed four hundred dollars only, and directed that amount to be paid. The plaintiffs declined the sum so allowed, and brought this action. It does not seem to have been claimed on the trial that the commissioners directly employed or retained plaintiffs; but it was attempted to be proven that they subsequently ratified the action of their district attorney in that respect; and upon this the complainants appear to have rested their case. The proof on their behalf was briefly the employment by the district attorney, the character of services rendered, their value, the presentation of the claim to the board of commissioners, and their action thereon, which consisted simply of a resolution directing the payment to the plaintiffs of four hundred dollars. Upon these facts the court was asked to charge the jury that they believed "from the evidence that the plaintiffs presented claim for the sum of five thousand dollars to the commissioners Lyon County, the defendant, and that after such presentation said claim for services, said board allowed or approved the sum of four hundred dollars gold coin only of such claim, you are instructed that such act of approval of a part of said claim does in itself alone constitute a ratification of any agreement or contract made by William Gates, district attorney of defendant, with plaintiffs for plaintiffs' compensation as attorneys or counsel in

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suit of the Virginia and Truckee Railroad Company against Lyon County." This was refused and exception taken.

The instruction should have been given. The only fact tending to make such a ratification was the action of the commissioners in allowing the plaintiffs four hundred dollars. In determining whether the instruction be correct or not, it must be viewed in connection with this state of the proof on the part of the plaintiffs. It is not necessary to decide whether under all circumstances, or as an abstract proposition, the action of the commissioners in making a partial allowance of a demand growing out of a contract between the district attorney and the plaintiffs will constitute a ratification of such contract, but only whether such was the result under the proof as it existed in this case. There was not a scintilla of testimony to show that the commissioners knew of any contract between the district attorney and plaintiffs at the time they made the allowances, nor did the claim as presented to the board show that it was made upon or grew out of any contract whatever. The minutes kept by the clerk constitute all the evidence upon this point, and they are thus set out in the record: "Monday, October 3d, 1870. Board of county commissioners. The following bills were examined and allowed: Clarke & Wells, (attorneys' fee in mandamus suit) five thousand dollars; allowed for four hundred." There is certainly nothing here showing that the plaintiffs' claim was made upon a contract of employment between plaintiffs and the district attorney. Indeed, we are unable to find a word in the transcript even tending to show that the commissioners had any intimation of such employment, beyond the mere fact that one of them knew the services were rendered. On the contrary, the commissioner Byron, who was present at the trial, testifies that he did not know by what authority the plaintiffs appeared in the case; and it is not shown that the others even knew the services were rendered. Now, then, here is a claim presented to the commissioners for legal services; the commissioners make a partial allowance of it; will that fact, without proof that they knew the claim was made upon a contract of employment by the district attorney, constitute a ratification of any such contract? The law is too well settled to necessitate argument or the citation of authorities that no act will amount to a ratification

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of an unauthorized contract, unless the person charged with the ratification is cognizant of all the material features of the contract which he is claimed to have ratified. But, if a full knowledge of all the *essentials* of the contract be necessary, how much more so the knowledge of the existence or execution of the contract itself. As it is essential to the validity of a contract that the minds of the contracting parties meet in harmonious understanding as to its tenor and provisions, so it is no less essential where it is sought to charge a party with ratifying it that he give his assent understandingly; for a ratification is after all but the execution of a contract on the part of the person ratifying it—it is the giving of his assent, without which no obligation would be imposed upon him. Hence the rule respecting ratification.

Under this rule, it is manifest if Gates had entered into a contract with the plaintiffs whereby the county was to pay them five thousand dollars for the legal services rendered, the county would not be held to ratify it, unless the commissioners were informed of the sum agreed to be paid; that would be not only a material fact, but perhaps the fact most material, to be known by them. But if information of such a fact would be essential, upon what ground can it be claimed it is not equally essential for them to know whether the services for which compensation is claimed were rendered upon contract, or gratuitously performed? If gratuitous, then it is clear the allowance of a portion of the sum claimed would not in any way entitle the plaintiffs to recover the balance, because the allowance, like the services, would simply be a gratuity; but if there were a contract upon which the claim was made, and it be held that a payment of a portion of the claim would ratify the contract, and there authorize the recovery of any stipulated sum, or what the service might be proven worth, as is the case here; then most assuredly it is essential that the commissioners know whether the claim is made upon a contract. It would be a doctrine no less dangerous than unwarranted by the law, to hold that county commissioners can make an allowance either in full or partial payment of a claim presented to them, without thereby ratifying some contract executed without authority, and entirely unknown to them. If there be any reason for the law which only holds the principal to a ratification of

unauthorized contract, when he is cognizant of all the material facts, by parity of reasoning there can be no such ratification when the very existence of the contract is unknown.

It was also incumbent on the plaintiffs, who relied on ratification, to prove that the commissioners knew of the contract, and not upon the defendant to establish the negative. *Nixon v. Palmer*, 4 Cal. 398. The presentation of the claim could not charge the commissioners presumptively with knowledge of it. They alone had the authority to bind the county in such contract, and they knew they had not done so; hence, the only presumption and natural inference was, that the services were gratuitously rendered. Thus the plaintiffs' case for ratification stood upon the bare fact that the commissioners made an allowance to them of four hundred dollars upon a claim of five thousand, which, as we have endeavored to show, without proof that the commissioners knew of the contract of employment, would not amount to a ratification; therefore the instruction was correct and pertinent, and should have been given.

The answer in this case directly denies any employment or retainer of plaintiffs by defendant—thus putting in issue the material allegations of the complaint; and also alleges that the services rendered were not worth over four hundred dollars, which sum the defendant offered to pay, avers its willingness still to pay, and brings the same before the court for that purpose. It is argued this plea of tender is an implied admission of the employment or retainer of plaintiffs, and consequently the only issue left to be tried by the pleadings was the value of the services rendered. This was undoubtedly the rule under the old practice. But we can see no reason why, under the practice adopted in this state, it should be so. The code allows the defendant to plead as many defenses as he may have, and also declares that in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties. Now, under similar statutory provisions, it has been held that the defendant may plead inconsistent defenses, provided they be not so incompatible as necessarily to render one or the other absolutely false; and as a consequence, that in so pleading he does not waive any of the defenses set up by him. See *Hill v. Brown*, 22 Cal. 671, and cases

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there referred to. In this case there is certainly no such absolute repugnance between the denial of the employment or retainer of plaintiff and the offer to pay a smaller sum than that claimed, as that both cannot be consistent. The tender of a smaller sum is certainly not a necessary admission that any sum is legally due ; it is simply an implication or inference which might, under former rules of pleading, be sufficient to bar all contradictory proof ; but under a practice which makes it the duty of courts to give a liberal construction to pleadings, with a view of effecting justice between the parties, it would be unwarrantable to allow such mere implication to overcome a positive denial or direct allegation of the pleader. Here the defendant has, under oath, denied that the plaintiffs were retained or employed by it ; how would it comport with the liberal spirit of the code to hold that such denial is rendered nugatory by an implication that they were so retained, arising simply from an offer to pay, and tender of a smaller sum than that demanded ?

But be this as it may, the plaintiffs cannot now for the first time make this point. At the trial it does not seem to have been claimed that the plea of tender was an admission of the contract of employment. The plaintiffs themselves introduced evidence for the purpose of establishing such contract, and no objection whatever was made to the testimony offered by the defendant tending to show the contrary. Whether such contract had been entered into or ratified was one of the issues submitted to the jury, and upon which, evidence was introduced by both parties ; and indeed no point, either by motion or otherwise, appears to have been made upon this implied admission in the answer until the case came to this court. Under the circumstances, the plaintiffs should not now be allowed to make it. Had this construction been claimed for the answer at the trial, the defendant would have had an opportunity to amend it by withdrawing the tender, and thereby obviate the result of a mere construction against it evidently never intended. For had it intended to simply put the plaintiff to the proof of the value of the services, it would not under oath have denied the employment.

It is manifest therefore, there was no intention to admit the retainer of the plaintiffs, and if such admission is made, it is simply by implication ; therefore justice demands that if advantage is to be

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aimed or reliance placed upon such implied admission, it shall be one before the opportunity for amendment has passed. *Klink and Wife v. Cohen*, 13 Cal. 23. It is hardly necessary to say that what is here said has no reference to direct admissions, but only to such as result from construction or implication, and where a consequence the pleader may be misled to his injury if the point be not made at a time when he may amend. Judgment reversed.

THE STATE OF NEVADA EX REL. WILLIAM THOMPSON v. THE BOARD OF EQUALIZATION OF WASHOE COUNTY.

EQUALIZATION OF ASSESSMENT WHERE NO LEGAL STATEMENT FURNISHED. Where the Central Pacific Railroad Company failed to furnish a proper statement of its taxable property within the time prescribed by law, and in default thereof the assessor placed a valuation thereon which the board of equalization afterwards reduced: *Held*, that the action of the board was unauthorized and should be annulled.

CERTIORARI—INADMISSIBLE RETURN—MOTION TO STRIKE OUT. Where on certiorari to review the proceedings of the board of equalization in reference to the reduction of an assessment against a railroad company, the clerk of the board was directed to certify whether it appeared before the board that the company served a statement of its taxable property within the time prescribed by law; and the clerk returned a certificate that it was proved before the board that such a statement had been furnished within time, but went on to show that his certificate was based upon the sworn statements of others, who composed the board at the time, and not upon his own recollection or the records of the board: *Held*, that such certificate was entirely inadmissible; and on motion it was stricken out.

CERTIORARI—WHAT RETURN MAY INCLUDE. Though the return to a writ of certiorari may include, in addition to the record properly so called, such orders and proceedings in the nature of record, and so much of the evidence as may bear upon the question of jurisdiction, it cannot include matter which is neither a part of the record nor of the proceedings before the inferior tribunal, such as affidavits presented to the clerk of such tribunal after the issuance of the writ or his certificate based thereon.

CERTIFICATE ON INFORMATION NOT CERTIFICATE OF FACT. A person who certifies to a fact, and in the same certificate states that it is done upon information derived from another, really only certifies to the information and not to the fact.

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"AMONG THE FILES" SUPPOSED TO MEAN "FILED." Where a clerk to a writ of certiorari certified that certain papers transcribed were correct copies of original papers "among the files" in his office, though the language was not as definite as it should be, it was a warrant the conclusion that such papers, being among the files, were filed.

REVENUE LAWS—FAILURE OF RAILROAD TO FURNISH STATEMENT. Imposing a penalty upon railroads for failing without legal excuse to the assessor on demand a statement of their taxable property, (Stats. 1869, 184) does not confer a discretion upon the board of equalization as to whether there is a legal excuse or not, nor authorize equalization where a statement is furnished.

"LEGAL EXCUSE" OF RAILROAD TO FURNISH STATEMENTS. The "legal excuse" mentioned in Section 3 of the Act of 1869, requiring railroads to furnish statements of their taxable property, (Stats. 1869, 184) is only to be used in case of a criminal prosecution as provided for by Section 6 of the Act of 1866 (Stats. 1866, 168) and not in proceedings before the board of equalization (Stats. 1866, 169, Section 15.)

Certiorari from the Supreme Court to the Board of Equalization of Washoe County.

From the affidavit of the relator, it appears that the effect of the action of the board complained of was to reduce the taxes to be paid by the Central Pacific Railroad Company of Washoe county from \$28,723.31 to \$14,055.25. The facts material to the decision are fully stated in the opinion.

Robert M. Clarke and L. A. Buckner, Attorney General for Relator.

I. The fact upon which the jurisdiction of the board of equalization depended, was the making of a statement by the company.

II. It is admitted that the evidence, so far as the same relates to jurisdictional facts, may be brought up and reviewed; but it is not admitted that the evidence must first have an existence in fact, and then appear of record, before it can be certified. At the point of fact, oral testimony had been heard, proving that a statement of the railroad company's property had been furnished. If demanded, still such testimony could not be certified, because it was not of record nor on file in the office, nor among the papers of the board of equalization. The clerk cannot "transcribe" that which

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existence. It is too apparent to need elaboration, that nothing can be certified except that which appears in the record of the proceeding. 2 Harrison, 25.

III. The distinction (sought to be taken) between "record" and "proceeding" is not sound. As used in the practice act, "proceeding" means the action taken, matter or thing going on before the tribunal, board or officer exercising judicial functions. It has the same significance when applied to matters of a judicial character pending before commissioners, as "case" when applied to an action pending in court. In one sense it may be said to enlarge the technical meaning of record; but it in no manner enlarges the office of the writ of certiorari. *Whitney v. Board of Fire Delegates*, 14 Cal. 500; 2 Ld. Raym. 436; 1 Salk. 148; H. Bl. B. 552; 5 Binn. 27; 8 Green'l, 293; 11 Mass. 466; 3 Halst. 125; *Central Pacific Railroad Co. v. Placer County*, 32 Cal. 582.

IV. The return that the demand of the assessor, etc., were "among the files," etc., was sufficient. As a matter of fact, papers used before the board of equalization are not required to be filed, except so far as their delivery to the board may be considered a filing. The board is the tribunal acting, not the clerk. When a paper is delivered to the proper officer, and by him received to be kept on file, it not only becomes a part of the proceeding, but in strict law is filed.

V. The question of "legal excuse" can have no bearing here. Those words, as used in the statute, have application exclusively to the punishment inflicted by Section 6 of the revenue Act of March 1st, 1866. In the statute referring to matters of equalization, nothing appears of "legal excuse." The powers of the board are the same in all cases—drawn universally from Section 15 of the general law; and hence it follows that the case at bar falls under that law, so far as it deals with the powers of the board.

S. W. Sanderson, for Defendants:

I. The writ of certiorari brings up for review, not only the written record as kept by the clerk of the board of commissioners, but in addition the evidence, whether written or oral, so far as the same

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relates to jurisdictional facts. *Moerwood v. Hollister*, 2 Se. 319; *C. P. R. R. Co. v. Pearson*, 35 Cal. 258; *The New sey Railroad and Transportation Co. v. Suydam*, 2 Harrison; *The People v. Goodwin*, 1 Selden, 568; *The Inhabitants of Andover v. The County Commissioners of Worcester*, 2 Allen, 4; *Baldwin v. City of Buffalo*, 5 N. Y. 375; *Magee v. Cottle*, 32 Barb. 239; *The People v. VanAlstyne*, 32 Barb. 131; *Whitcomb v. Board of Delegates of the San Francisco Fire Department*, 32 Cal. 500; *Lowe v. Alexander*, 15 Cal. 300; *Blair v. Hamilton*, 32 Cal. 49; *Jolley v. Foltz*, 34 Cal. 321; 2 Stra. 919; 2 *Raymond*, 1375; 2 Stra. 996; 8 Term, 220, 588; 7 East, 314; 14 East, 267; 24 N. Y. 399.

II. The demand of the assessor and the statement of the road company must both be disregarded. The certificate entirely fails to show that they were used, or that they were ever deposited or filed with the clerk. This court cannot afford to hold that a mere finding of documents among the papers of a public officer is proof of filing. Such a doctrine, for obvious reasons, would open the door to innumerable frauds. The demand of the assessor is not only to be excluded from the record, but the existence of any presumption that there was a demand must be denied. The case stands wholly upon the minutes of the board, which exhibit a case in which there has been neither demand nor statement. That the board could act in such a case is clear, and it is therefore clear that the record shows affirmatively a case in which the board had power to act.

III. But assuming that the demand and statement are to be considered as a part of the record, and the last return of the clerk is not, the board still had jurisdiction. The language of the railroad act, "without legal excuse," confers upon the board discretionary power. It gives them jurisdiction in a case even where there has been no statement furnished—much more in a case where there has been one furnished, although not within the precise time required. *People v. Dwinelle*, 29 Cal. 635; *People v. Burney*, 29 Cal. 474; *Morley v. Elkins*, 37 Cal. 454.

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By the Court, LEWIS, C. J. :

It appears by the petition in this proceeding, that on the ninth day of August, A. D. 1870, William Thompson, the assessor of the county of Washoe, made demand upon the Central Pacific Railroad Company for a statement of its taxable property within his county ; and required the same to be furnished within fifteen days from the date of the demand. The assessor having received no statement which in his opinion conformed to the requirements of the statute within the time designated, proceeded on the seventh day of September to assess the property of the company, upon such evidence and information as he could obtain. Two days afterwards, however, a statement was received by him from the company, which it is admitted is in conformity with the law ; but the time fixed for serving it having expired, and the assessment having been made, the assessor disregarded it.

On the third day of October, A. D. 1870, the board of equalization met, and upon application of the company, reduced the valuation placed upon its property from one million forty-four thousand dollars, to five hundred and eleven thousand ; the assessor, being present before the board, protested against its action in this particular, claiming that as the company had neglected to furnish the required statement within the time designated, the board possessed no authority to equalize or reduce the assessment. Certiorari was applied for, and the clerk of the board, in obedience to the writ, certified to this court the demand made by the assessor upon the railroad company ; the statement of the superintendent, dated September 9th ; the written protest of the assessor against the action of the board, together with his assessment of the company's property, to be correct copies of papers filed in his office. He also certifies the assessment roll and the minutes of proceedings taken down at the time. In addition to this, he sends up an affidavit made by the superintendent, to the effect that on or about the eleventh day of August, A. D. 1870, he received a certain document purporting to be signed by the assessor, Thompson, which was the demand already referred to ; that on the twentieth of the same month he made a statement showing the amount, character and valuation of all property of the Central Pacific Railroad Company,

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taxable in the county of Washoe ; that the statement was received by Thompson on the twenty-second day of August, as appears by a letter annexed, written by him ; that after the receipt of the letter, the affiant addressed a letter to Thompson, of which a copy was annexed ; that on the second day of September, 1870, Thompson wrote to the affiant in reply, of which a copy is likewise attached ; that afterwards, to wit: on or about the eighth day of September, with a view to obviate supposed defects in the statement of August 20th, affiant made a further statement which was delivered to Thompson on the ninth day of September. The first letter mentioned in the affidavit as being received from Thompson, was in substance a notification that the statement was not correctly made out, and did not conform to the statute ; the letter written in reply was a request that the assessor point out the defects, which, if any existed, would be corrected by the company. The third letter was Thompson's answer pointing out the defects in the first statement. This affidavit was made on the sixth day of April, A. D. 1871, and the facts set out in it are corroborated by the affidavit of D. W. Haskell, made on the eighth day of the same month. In response, also, to an order of this court that the clerk certify whether it appeared before the board of equalization that the Central Pacific Railroad Company served a statement on the assessor of Washoe County within the time allowed by law, the clerk certifies that it was proved before the board that a statement or list of the railroad company's taxable property situate in Washoe County, subscribed and sworn to by the superintendent of the company, had been furnished to the assessor within the designated time. But he goes on to state that the certificate thus made by him was based upon the sworn statement of the persons who composed the board at the time of the equalization in question—not upon knowledge of his own, or upon anything appearing of record. As a matter of fact, the certificate was made upon affidavits presented to the clerk for the purpose of obtaining the certificate, and at the time it was made. It is not claimed that the clerk could or did make the certificate upon his own recollection of the fact or anything in the records of his office ; but, as shown by an affidavit filed in explanation of the certificate, it was made solely upon the affidavits presented to

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that such was the fact. Upon this state of facts, a motion is made to strike from the clerk's return the affidavit of Towne, with the letters and statement thereto annexed—together with the affidavit of Haskell and affidavit of Corning and Weed; thus leaving nothing but the papers which the clerk certifies were filed in his office with the tax papers of the year 1870, which were the demand by Thompson, the statement of September 9th made by the railroad company, the protest of Thompson, and the assignment as made by him, with the minutes of the proceedings of the board. In support of this motion, it is claimed that the writ of certiorari should bring up only the record of the tribunal whose action is sought to be reviewed.

Such, in cases of a common law writ, has undoubtedly been held to be the rule by numerous, if not the majority of decided cases. There are authorities, however, of no less weight, holding that not only what is strictly the record is brought up, but also such orders and proceedings in the nature of record, together with so much of the evidence as may bear upon the question of jurisdiction, may be returned to and considered by the court of review. From decisions holding this view, and the language of the statute of this state, which directs the party to whom the writ is directed to certify fully the record and proceedings, that the same may be reviewed by the court issuing the writ, it is claimed that all the evidence and proceedings, whether any minutes were taken of them or not by the tribunal or officer, should nevertheless be returned and certified; and hence the certificate by the clerk, based upon affidavits presented to him after the writ was issued from this court, to the effect that a certain fact was proven before the board, is properly a part of the return, and should be considered by this court. It does not appear to be claimed by counsel in the brief on file, that the affidavit of the superintendent, with the exhibits annexed, and the affidavits of Haskell and others, are properly a part of the return. But even if it were, nothing is clearer than that they are not so. They are neither a part of the record, nor can they be said to be any part of the proceedings of the board; for it is not pretended that they were ever before it, or that it knew anything of them at the time it equalized the tax. But that the clerk's certificate as to the fact

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proven before it should be received by this court as a proper of the return, is still maintained.

We are clear that this position taken by the learned counsel on behalf of the commissioners is not tenable; and although we do think the return should be confined to what is technically the record, still in addition thereto it should only embrace such of the evidence and proceedings bearing on the question of jurisdiction as may have been reduced to writing at the time, or perhaps subsequently, by authority of the board. This is in harmony with the analogies of the law in similar proceedings, whilst the course intended for by counsel appears to be in direct opposition to the rule. It would certainly be a novel proceeding to set aside or support the judgment of a tribunal exercising judicial functions upon testimony sought after upon the streets as to what action it may have taken or what fact may have been proven before it. The law is scrupulously guarding against any misrepresentation of the proceedings of inferior tribunals to the appellate courts reviewing their decisions; therefore, to guard against it, as a general rule, it accepts no other than the authoritative evidence of what proceedings were had than the certificate of the judge or tribunal itself whose order is to be reviewed. Thus, by writ of error, the appellate tribunal was strictly confined to the record of the lower court, and upon it the judgment below could neither be sustained or attacked by facts or matter not appearing of record. In this way the regularity of the proceedings below were tried upon the case as made out by the tribunal whose action is complained of—for its records are made up by it under its supervision, through the medium of its clerk. As nothing less than the signature of the presiding judge is deemed sufficient to authenticate a bill of exceptions taken to review rulings. So, also, as to statements on appeal—when allowed by statute, they are almost uniformly required to be approved by the court or judge whose rulings are to be reviewed; or, what is deemed equivalent, must be agreed to as being correct by the attorney. Indeed, we know of no case where the judgment or proceedings of a lower court can be set aside by an appellate tribunal upon no better showing of the action at the trial than the testimony of a bystander.

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• Surely, no court of review would take the affidavit or testimony of a person although knowing the fact, as to what evidence was admitted or rejected, or what was the ruling upon this question or that by the court below, and upon that evidence determine whether the court whose action it is reviewing proceeded correctly or not. Why move so upon review by certiorari? There is no reason against such practice in the cases mentioned, that will not apply with equal force to a review in cases of this kind. We know of no reason why the proceedings to be reviewed under this writ should not be presented to the court above in a manner equally authentic as in the analogous proceedings mentioned. It is no less essential that there should be no misrepresentation of the action or rulings to be reviewed upon this writ, than in cases of review upon any other. But in this case, the fact that the evidence in question was presented to the board is not authenticated by proof equal to that of the affidavit of a person who was cognizant of the fact. The clerk certifies that the evidence was presented to the board, but also states that his certificate is based, not upon his own knowledge of the fact, but upon an affidavit of a person whom he also certifies was one of the county commissioners at the time of the equalization. Such a certificate is certainly not of equal weight with the affidavit itself, for it is simply the clerk's interpretation of the affidavit. A very different construction might possibly be placed upon it, if presented to this court for action upon it. Hence the reason for the rule, that when a fact is of record the proper evidence of it is a copy of the record duly authenticated, the officer not being allowed to place his own interpretation upon it, and make the certificate accordingly. As has already been said, we do not think the affidavit itself would be admissible for the purpose sought, much less the mere certificate of the clerk as to its contents, for legally that is all the certificate amounts to.

A practice, therefore, so utterly out of harmony with all similar proceedings should not be upheld in cases of certiorari, unless clearly sanctioned by the uniform practice of the courts, or the clear language of statute. The decisions relied on do not sustain it. Those cited, as we understand them, do not uphold or even suggest such practice. Generally they only announce the rule, that the court

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will look into the evidence in the return for the purpose of deciding the question of jurisdiction. This is what was held in the case of *Whitney v. The Board of Delegates of San Francisco Fire Department*, 14 Cal. 500. The English cases, *Rex v. (1808) Term*, 220; *Rex v. Smith*, Id. 588; *King v. Crisp*, 7 *King v. Chandler*, Id. 627, only hold that in cases of summary conviction, the court of review will look into the evidence. It was the duty of the magistrates in such cases to reduce the evidence to writing and make return of it with, and as a part of the record. In *Mullins v. The People*, 24 New York, it is only held that a common law certiorari to review a summary conviction under a penal statute, brought up not only questions affecting the jurisdiction of the magistrate and the regularity of his proceedings, but the question whether there was any evidence to sustain the conviction, and that in such cases the evidence must appear on the face of the record or the conviction will be quashed.

The question here involved was not made nor suggested in any of the cases mentioned. There is certainly no doubt, if the law requires an officer or court to reduce the evidence taken before to writing, and it is done, which was the fact in all the English cases referred to, it might properly be embodied in the return on the writ. And the other cases only hold that the court of review will look into the evidence for certain purposes. So we have frequently held. 5 Nev. 317. But when it is said that the appellate court will review the evidence, it is only to be understood as referring to such evidence as may properly be returned or certified. There was no question in any of the cases as to whether evidence not reduced to writing, or of which no minute whatever was taken, would be reviewed upon a mere certificate that it was given. In *King v. Barker*, 1 East, 186, which is claimed to be directly in point, it was held that a magistrate was authorized to make return to a writ of certiorari of a conviction in a more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk. The conviction returned being fully warranted by the minutes taken at the time. "It is a matter of constant experience," says Kenyon, "for magistrates to take minutes of their proceedings."

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without attending to the precise form of them at the time when they pronounce their judgment, to serve as memoranda for them to draw up a more formal statement of them afterwards to be returned to the sessions, and it is by no means unusual to draw up the conviction in point of form after the penalty has been levied under the judgment." It will be seen, nothing is decided in the case except that it was proper for the magistrate to draw up his proceedings in formal shape from minutes taken at the time of trial, before making return of them in answer to certiorari. There the magistrate simply wrote out that in a more formal manner, which was in substance already a part of his record. It is the daily practice now, as it was at the time of the decision, for magistrates and the clerks of courts to make up their records in form after the close of the case or proceeding, from minutes taken at the time. It is not expected that the records will be finally written up as the proceedings progress in the case, for that is generally impossible; hence, reasonable time should be given to put them in form, and that is all that was held in the case of *King v. Barker*. The record was substantially made up at the time of the conviction, and was only afterwards elaborated and put in legal form. It was not pretended that there was no record of the facts certified until the writ issued. It does not, therefore, seem to be a case sustaining a certificate of a fact by a clerk who has no minutes or record upon which to make it, but only information obtained from other persons.

In the case of the *New Jersey Railroad and Transportation Company v. Suydam*, 2 Harrison's R. 25, affidavits were received by the Supreme Court, and upon them the award of the commissioners was set aside, although evidence in support of it was refused upon the ground that it should have been sustained by the record itself. This might very well be done; for if the proceedings of the commissioners were not what might be strictly called record, evidence might be received to establish a want of jurisdiction—that being for the purpose of showing that it was not record, as it could not be so considered under some authorities, if the court making it acted without jurisdiction. In such case, if the court of review has the authority to hear evidence *dehors* the record at all, it might receive it for that purpose. But a different rule seems to govern

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when it is sought to *sustain* the jurisdiction below by such evidence. This appears to be the view taken in that case ; so far as it goes on the question here in hand, it is directly opposed to the position taken by counsel for the defendant. The Chief Justice in his opinion (page 30) says : “ Among several objections apparent on the face of this record, there is only one which I shall notice. It is that the commissioners have assessed damages for running, and maintaining a fence, without showing that the lands of the defendant, through which the road runs, are improved lands. I am not *improved* lands, (whatever that expression may mean) and the commissioners have exceeded their authority ; they have gone beyond their jurisdiction ; and their proceedings, so far at least as they relate to that matter, are illegal and void. It is no answer to the objection to say, nor even to prove by evidence *dehors* the record, that the lands in question were *improved* lands. That fact may be, and probably is so, but it must appear on the face of the record, or else the record will be incomplete. We cannot put such supplementary evidence on the record in the clerk’s office, and then patch up the award and sustain the jurisdiction of the commissioners. The rule I apprehend to be clear and well settled, that persons exercising a special and delegated authority must show on the face of their proceedings that they have acted within the prescribed limits.” This case, then, instead of sustaining the position here contended for, appears to be opposed to it ; for if the appellant court could not sustain the award by receiving evidence *dehors* the record, nor order it placed on file in the clerk’s office and so patch up the award, it is manifest the clerk would not be allowed to do so, as is claimed he may do here.

It may then be said with confidence, that these cases do not sanction the practice of allowing the clerk of a tribunal to make an award from memory, without any minutes or record to guide him, as if the proceedings of a tribunal may have been, and so make a record for the court of review ; much less to make such a certificate of information obtained from other persons ; and if they do not report such practice, they have no pertinency to this case.

Nor does the language of the statute warrant it ; but, on the contrary, the only inference deducible from it is, that it w

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contemplated by the legislature. Section 438 of the code of procedure, declares that, "the writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the records or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, shall return the writ, with the transcript required." Section 439 provides that, "the writ of review shall command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, (describing or referring to them with convenient certainty) that the same may be reviewed by the court." * * * It will be observed that the *transcript* of the record and proceedings is required to be returned—the clerk "shall return the writ with the *transcript* required," is the language. And again, in giving the form of the writ in Section 439, it shall require the party to whom it is issued to return the writ and "annex a transcript of the record and proceedings." Now the word "transcript" at once suggests the idea of an original writing. The word, not only in its popular but legal sense, means a copy of something already reduced to writing. Worcester defines it as "a writing made from or after an original; a copy." Burrill defines it as "a copy; particularly of a record." Bouvier: "a copy of an original writing or deed." Now, if anything beyond what is reduced to writing were intended to be certified—the legislature would certainly have been more definite—would not have stopped by simply requiring a *transcript* of the record and proceedings to be returned. The requirement to return the "record and proceedings" is not by any means unusual, even when nothing is sought but the record. The form of the writ of error, as generally employed is, that the record and proceedings be returned to the court of review. Still, it has never been claimed that under this requirement to certify or return the proceedings, anything but what is spread upon the records below could be *considered* by the appellate court. It would certainly not be unfair to presume that the words were used in the statute as they were after used in legal proceedings prior to its adoption, as embracing nothing more than such matters as are spread on the records, even

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if there were nothing in the context of the statute itself to warrant such presumption.

However, so far as this case is concerned, it might very safely be admitted that the employment of the word proceedings, in this statute, was intended to authorize the court or officer to whom the writ is issued to certify facts not committed to writing, but held in remembrance until required to be returned, for there is no such certificate here. Certainly, if a certificate of such fact could be received at all, it must be made upon the knowledge of the person making it, otherwise it would not be his certificate in its full intent and meaning. A person who simply certifies to a fact, and in the same certificate states that it is done upon information derived from another, really only certifies to the information or knowledge of another. He does not certify to the fact of his own knowledge. In this case, that there might be no mistake, the clerk makes the statement that the certificate is made upon affidavits presented to him for the purpose of enabling him to make it. This cannot be a compliance with the statute, which requires the tribunal to whom the writ is issued, or its clerk, to certify the record and proceedings.

But it is argued, if this certificate is rejected, the demand of the assessor and the statement of the railroad company should also be disregarded, because not shown to have been used by the board, or to have been on file at the time of equalization; and as a consequence, the board would be shown to have jurisdiction to equalize, as there would be no proof of a refusal to comply with any demand of the assessor. However, it seems to us the clerk's certificate that "the demand, statement of A. N. Towne, statement of the assessor, and the protest of Thompson, are true and correct copies of original papers among the files of tax papers of Washoe County for the year 1870, now on file in my office," serves to show that they were on file at least. It is true, he afterwards certifies that he was not present during the entire sitting of the board, and therefore does not know what papers were used. Nevertheless, this certificate warrants the conclusion that the papers mentioned were filed, as they are certified to be copies of original papers among the files of the office. It is not as definite in this respect as it should

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still, the papers being taken from among the files, warrant the conclusion that they were themselves filed. If on file, they are of course a part of the records of the board, and must be presumed to have been before it.

By the papers thus returned, then, it appears a demand was made, and that it was not complied with by the railroad company ;

the case is thus brought directly within the statute, that no equalization shall be made when no statement is furnished, and also within the case of *The State v. The County Commissioners of Washoe County*, 5 Nev. 317.

Again, it is argued that the failure to furnish a statement within the time designated by the law does not deprive the board of jurisdiction, because it is claimed the statute only imposes the penalty where the person applying therefor has neglected to make a statement without *legal excuse*. This language of the statute is said to confer a discretion upon the board to determine whether there is a legal excuse or not ; and, if it determine there is, although it may err in judgment, it is not ousted of jurisdiction. Counsel, we think, has entirely misapprehended the purport of the section of statute referred to.

It reads thus : "If any corporation, company or person owning a railroad fail, neglect or refuse, after being notified, to furnish a statement for assessment and taxation, as provided in this act, the county assessor may proceed to make the assessment in the same manner as in other cases, as provided in the act to which this act is supplemental ; and any person upon whom a demand is made for a statement, as in this act provided, failing, neglecting or refusing to furnish a statement as required, without legal excuse, shall be subject to the same punishment as in other cases of such failure, neglect or refusal, as provided in the act aforesaid." The punishment inflicted in cases of the neglect or refusal mentioned is imposed by Section 14 of the original Act of 1866 ; whilst the power of the board to equalize taxes is regulated by Section 15. The first imposes a punishment on the individual—the other simply prescribes the jurisdiction of the board of equalization, depriving it of the authority to equalize, when the person applying for that purpose has failed to comply with the demand for a statement. Nothing is clearer than that the legal excuse mentioned in the Act of 1869 is only to

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be considered in the criminal prosecution, and not before the board of equalization. The punishment shall be inflicted where there is no legal excuse for the neglect or refusal to comply with the demand of the assessor. The prohibition upon the board to equalize the tax of a person in default is not spoken of in the original act as a punishment; it is simply declared that in such case there shall be no equalization. The punishment imposed by Section 6 is one thing—the power and jurisdiction of the board is an entirely different thing. Because the punishment is only to be inflicted where there is no legal excuse for the neglect or failure of a person to make a statement, it by no means follows that the power of the board of equalization is thereby changed; that, notwithstanding Section 15 expressly prohibits an equalization of the tax of a person who has neglected or refused to comply with the demand, still, they may, under this section of the supplemental act, claim the jurisdiction, whenever it may conclude there was a legal excuse. It is too manifest to admit of argument, that the legislature in the supplemental act simply intended to allow the showing of a legal excuse as a defense in cases of criminal prosecutions, and not to extend or interfere with the jurisdiction of the board of equalization. Section 15 of the Act of 1866, to which we must look for the jurisdiction of the board, gives it no discretion whatever, but imperatively declares that, where the person complaining of the assessment has refused to give the assessor his list, under oath as required, no reduction shall be made by the board of equalization of the assessment made by the assessor.

There being no discretion in the board in regard to this matter and no showing of jurisdiction, the action of the board was unauthorized, and must therefore be annulled, and judgment entered accordingly.

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THE STATE OF NEVADA, RESPONDENT, v. THE CENTRAL
PACIFIC RAILROAD COMPANY, APPELLANT.

TAX SUIT—FRAUD IN ASSESSMENT AS MATTER OF DEFENSE. Where, in a suit against the Central Pacific Railroad Company to recover taxes under an assessment made in the *absence* of a legal statement, defendant set up in answer that the assessment was made by the assessor, fraudulently and contrary to his official judgment, at a sum nearly three times greater than the fair value of the property: *Held*, that such answer stated good matter of defense and was not demurrable.

MEANING OF ALLEGATION OF "FAIR VALUATION." Where, in answer to a tax suit, the defense was fraud in the assessment, and it was alleged that in a certain statement furnished the assessor, (but which was informal) the property was "set down as of the value of \$6,000 per mile, which was a fair valuation thereof, and so known and believed by the assessor": *Held*, that this amounted to an allegation that \$6,000 per mile was a just and fair value, and consequently that an assessment of \$15,000 per mile was excessive.

LIBERAL CONSTRUCTION OF PLEADINGS. The old common law rule, that a pleading must be construed most strongly against the pleader, is replaced by the broader, more sensible and just rule of the code, that it shall be liberally construed with a view to substantial justice between the parties.

FRAUD IN ASSESSMENTS. As the law requires an honest and just estimate of value to be placed upon property for the purposes of taxation, an excessive valuation made by an assessor contrary to his official judgment and with intent to injure, is a fraud against which the law will afford relief.

FAILURE TO FURNISH STATEMENT—EXORBITANT VALUATION. The fact that a taxpayer fails to make a statement as required by law, does not authorize the assessor to impose a valuation which he knows to be exorbitant and unjust.

APPEAL from the District Court of the Third Judicial District,
Washoe County.

This was an action against the Central Pacific Railroad Company and its real estate in Washoe County, to recover \$16,402.50 alleged to be due for taxes for the year 1869, and ten per cent. thereon as damages for non-payment. The valuation of the property of the company was the same referred to and involved in the case of *The State v. Commissioners of Washoe County*, 5 Nev. 317.

S. W. Sanderson, for Appellant.

I. Fraud in the assessment is one of the defenses allowed by the statutes of this state in actions of this character. Under this pro-

vision, any act on the part of the assessor, of either omission or commission, which misleads the taxpayer, or allows him to suppose, contrary to the truth, that he has secured to himself the benefit of statutory provisions intended for his security and protection against unequal and oppressive taxation, must amount to fraud. The *repressio veri* or *suggestio falsi* of equity jurisprudence must amount to fraud under this statute. In this case, the appellant was deprived of its legal right to an equalization of the assessment in question, by the action of the assessor; and, further than this, the assessor, in willfully assessing the property, contrary to his official judgment, at a higher figure than its actual value, perpetrated a gross fraud upon the appellant.

II. The property in question is exempt from state taxation. 12 U. S. Stats. at Large, 489; *Cooley v. Board of Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Wallace, 713; *Crandall v. The State of Nevada*, 6 Wallace, 35.

III. It is not claimed that the National Government has an exclusive jurisdiction in all respects over this road. Such a claim would be untenable. Its jurisdiction is limited to such matters as affect its right of construction, maintenance, repair, and unembarrassed, unobstructed, and unburdened use for all purposes for which said road has been constructed, leaving the jurisdiction of the state untouched as to all matters which are not calculated to retard, impede, burden, or in any manner control its full operation. Nor is it claimed that the interest of private individuals in the road cannot be taxed by the state; but it is not conceded that the stock of the corporation can be taxed by the state.

L. A. Buckner, Attorney General, and *Robert M. Clarke*, for Respondent.

I. The answer is insufficient, inasmuch as it does not state the facts which constitute the alleged fraud. 1 Van Sandtford's Pleading, 355; 15 Cal. 414; 30 Cal. 572.

II. The alleged excessive valuation does not constitute fraud under the statute. 10 Wend. 186. Equalization is the remedy for excessive valuation. 4 Nev. 251. But this remedy is forfeited

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by failure to make statement. Stats. 1869, 185, Sec. 3. 5 Nev. 317. Assessors can make valuation without statement, and without demand of statement. 4 Nev. 338. The statement is merely in aid of the assessor. 4 Nev. 178, 251.

III. The taxing power of the state reaches all the property and business within the state not properly denominated "means of the General Government." Angel & Ames on Corporations, 470, note 3; *Nathan v. Louisiana*, 8 Howard, 83. The Central Pacific Railroad Company of California is not a means adopted by the General Government in the execution of its constitutional powers, either within the rule of reason or decided law. It is a private corporation. Angel & Ames, Sec. 14; 4 Wheaton, 668.

By the Court, LEWIS, C. J.

The state filed a complaint, in the usual statutory form, against the defendant, for the recovery of a tax due and unpaid for the year 1869. The defendant's answer was demurred to, and the demurrer sustained. A supplemental answer was also filed, and afterwards an amended answer, which was also demurred to, and the demurrer sustained; and upon refusal to amend, judgment was rendered for the state, from which defendant appeals.

The grounds taken by the demurrer are: first, that the facts relied on in the answer are not alleged with sufficient certainty; and secondly, admitting the pleading to be sufficient in this particular, still the facts do not constitute a defense. The defense pleaded is fraud in the assessment, and the facts constituting it are thus charged in the defendant's pleading: "That on or about the tenth day of August, A. D. 1869, John Corning, then being the acting general superintendent and managing agent of the Central Pacific Railroad Company of California, the aforesaid defendant, did furnish and deliver to said assessor a duly verified statement of the property belonging to the said railroad company, with the value thereof set down, as required by the act of said state, entitled "An act supplemental to an act, entitled an act to provide revenue for the support of the government of the state of Nevada, approved March 19th, 1865, amendatory thereof," approved March 6th, 1869. Said statement was duly sworn to by the said John Corn-



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ing, as managing agent as aforesaid, before an officer of a state of Nevada, duly authorized to administer oaths, of which the said assessor had full knowledge; but the said John Corning fraudulently omitted to describe himself in the affidavit appended to said statement as the acting general superintendent of said defendant and also omitted, through inadvertence, to sign the same; and the said assessor, although it was his duty so to do, and although he had ample time and opportunity so to do, failed and refused to call to the attention of the said John Corning, or the said defendant, the said mistake; but craftily and fraudulently intending to discharge his duty in the premises, and to evade the laws of the said state, and such case made and provided, and to impose upon said defendant company an excessive, illegal and fraudulent valuation, did the said assessor omit the said omission from said railroad company, and fraudulently determine that he would take advantage of said omission and act in and in disregard of his official duty and judgment, would assess said property at more than its value; that he knew and was well satisfied that said statement, so sworn to by said Corning, contained a fair valuation of said property, and had it been properly signed, he would have assessed the same as so stated; but in view of said omission, he assessed the said property at a much higher value, contrary to his official judgment, and with intent to impose an excessive valuation and tax upon said defendant. That the said statement, so verified by said John Corning, the said railroad telegraph line of the said railroad company were set down at a value of six thousand dollars per mile, which was a fair value thereof, and was so known to and believed by the said assessor, yet the said assessor, without notice to the said defendant or the said John Corning, or other officer of said company, and availing himself of other evidence under oath, and contrary to his official judgment, did fraudulently and craftily set down an excessive valuation of the said railroad of defendant at the sum and value of fifteen thousand dollars per mile."

The first question necessary to be determined here is, whether there is a direct allegation that the property was assessed beyond its real and just value—whether fifteen thousand dollars per mile is an excessive valuation; for if there be no such allegation, it

admitted at once there is no showing of injury resulting from the fraud charged, and consequently it constitutes no defense to the recovery of the tax. It will be seen the answer alleges that Corning set down the value of the road, in the statement made by him, at six thousand dollars per mile, and then it is directly averred that the value so set upon it was a fair valuation thereof. This is not an allegation that Corning deemed that sum a fair valuation, but the defendant itself makes the direct and positive averment that the value so fixed by him, that is, six thousand dollars per mile, was the fair value of the road. This is substantially and virtually an allegation direct and unequivocal that six thousand dollars per mile was its just and fair value. If the allegation referred to does not amount to this, we are at a loss to determine what is meant by it. If the mind be not influenced by the remembrance of the old rule, that a pleading must be construed most strongly against the pleader, but seek to solve the question in hand solely by the broader, more sensible and just rule of the code, namely, that "in the construction of a pleading for the purposes of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties," (Practice Act; Section 70) there can certainly be no question but the defendant has, in that portion of the answer referred to, directly alleged that six thousand dollars was a fair valuation of the property assessed.

It is equally clear that the law only requires property to be assessed at its fair value—by which it is to be understood, its just, honest, equitable or reasonable worth or price. Does the law require more? Certainly not. It only demands that an honest and just estimate of value shall be placed upon property for the purpose of taxation. Nor does it always require its exact value; for in a majority of cases there is something which cannot be ascertained by fixed and unalterable rules; where it has no fixed market value, it can only be arrived at approximately, by calculation or estimation, by comparing it with other property of similar character, by the extent of its productiveness, or the revenue which may be derived from it, taking also into consideration its durability, the probable length of time that it will yield a profit, with numerous other matters which often necessarily enter into or affect its value. In

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such case, oppression upon the citizen by an excessive valuation to be avoided on the one hand, and wrong to the state on the other by an insufficient estimate; but its fair or just value (all the influencing circumstances considered) should be ascertained for the purpose of taxation. When this is done, the law is undoubtedly satisfied and justice accomplished. Property may—nay, often does—have a temporary and fictitious value, which, however, can seldom be realized. Can it be claimed that in such case it should be assessed at such value, which would often be far beyond what it probable can ever be realized from it, and which is only transitory in its character? No assessor who is actuated by the honest purpose and just motives which should always control public officers in the discharge of their duties, would consider it his duty to place such fictitious and uncertain value upon it, but would rather ascertain its true, real or just value by the best means within his power and assess it accordingly; for every man is satisfied, by intuition even, that the law requires only the real and fair value of the property for the purpose of taxation. If it is estimated beyond that an injustice is done the citizen; if less, a wrong is perpetrated to the commonwealth.

But is the allegation equivalent to an allegation that six thousand dollars was the fair value of the road; that is, would there have been any substantial difference in the allegation had the word “value” been used instead of “valuation”? Evidently not. The word valuation as here employed signifies value. Valuation is defined as the price set upon anything—the estimated or rated worth of anything; value. The words, as defined, seem to be synonymous. Value is generally but an estimate of the worth of a thing—there is not an exact standard whereby it can always be determined; and valuation, when used in its passive signification, as in this allegation, means the estimated value or worth placed on the thing.

Here then, is an allegation that the fair or just value of the road (and consequently the value which the law made it the assessor's duty to place upon it) was six thousand dollars per mile. If it is charged that, although he knew this to be its fair value, contrary to his official judgment, and with intent to defraud the defendant, he fraudulently and craftily set down and assessed

same at fifteen thousand dollars a mile. Can it be said that such facts do not constitute a fraud against which the law will afford relief? Can it be maintained that if the taxpayer has inadvertently neglected to make a statement as required by the assessor, the latter may disregard every known rule for estimating the value of property for taxation, and impose a valuation upon it which he knows to be exorbitant and unjust? In other words, is the taxpayer under such circumstances completely at the mercy of the assessor? Clearly not. Every man's sense of justice revolts at such a doctrine; nor does the law leave the citizen so utterly without protection. The statute imposes a penalty for a failure or neglect to make out a statement, which is the deprivation of the right to have the assessment made by the assessor equalized by the board constituted for that purpose. Yet, he has still the right to insist that the officer, who in such case makes the assessment, shall discharge his duty honestly, and that he shall not knowingly and fraudulently place an excessive valuation on his property. Notwithstanding the failure on the part of the taxpayer to return a list when demanded, it is no less the duty of the assessor to be governed by just rules and the fairest motives in making the assessment of his property. Such failure to comply with the demand of the officer does not place the citizen in the condition of an outlaw, beyond the reach of law or the protecting arm of a court of justice. To a certain extent it is true the statute expressly deprives him of a right—that of obtaining relief before the board of equalization. This, however, is the extent of the penalty for the neglect. This takes from him the right to claim any reduction in the valuation of his property, if the assessment has been honestly made; although it may be exorbitantly overestimated; but does not deprive him of the right to claim relief in a court of justice against an overestimate, fraudulently and purposely placed on the property—he is deprived of all remedy for the errors of the assessor, but not for his fraudulent misconduct. The statute designates a fraud in the assessment as one of the defenses which may be made to an action for taxes. The facts here alleged certainly constitute fraud in the assessment, and consequently the case is brought directly within the statute.

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It must be borne in mind that we are simply discussing the deficiency of a pleading and not the real facts in this case, and therefore do not wish to be understood as intimating that fraud really practiced. That is a matter which must be established by the defendant, if it exists at all, at the trial on its merits.

The demurrer was improperly sustained. The order and judgment below must, therefore, be reversed.

By GARBER, J.: I dissent.

DANIEL G. CORBETT, *et al.*, v. L. R. BRADLEY, *et*

TIME TO PRESENT CLAIMS AGAINST CAVANAUGH FOR STATE CAPITOL CONSTRUCTION. The limitation of thirty days time, within which to present claim against Peter Cavanaugh to the State Board of Examiners for services rendered and materials furnished for the state capitol, under the Act of March 1871, (Stats. 1871, 154) was a material provision, and to authorize legal action by such board, had to be complied with.

STATUTORY CONSTRUCTION—WHAT IS DIRECTORY. No specific requirement that a statute should be dispensed with or held merely directory, unless it is clearly manifest that the legislature did not deem a compliance with it material, unless it appears to have been prescribed simply as a matter of form.

PRINCIPLE OF DECISIONS AS TO WHAT IS MERELY DIRECTORY. When any requirement of a statute is held to be directory and not material to be followed upon the assumption that the legislature itself so considered it, and did not intend to make the right conferred dependent upon a compliance with the requirement prescribed for securing it.

LIMITATION OF TIME TO PRESENT CLAIMS—PRESUMPTION OF MATERIALITY. When a special act in relation to the presentation of certain claims, otherwise allowable, required them to be presented within thirty days, (Stats. 1871, 154) and therefore made a distinction between such claims and ordinary ones as to the time of presentment: *Held*, that the presumption was, that such limitation as to time was material and necessary to be followed.

This was an application to the Supreme Court by Daniel G. Corbett and William H. Corbett, partners under the firm name of Corbett Brothers, for a mandamus to require L. R. Bradley, Governor, J. D. Minor, Secretary of State, and L. A. Buck, Attorney General, comprising the State Board of Examiners

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take action upon certain claims amounting to \$711.12, presented by relators, as assignees of various persons, for services rendered and materials furnished to Peter Cavanaugh for construction of the state capitol, under the act in reference to such claims of March 6th, 1871. It appears that the claims were not presented until April 6th, 1871, one day after the expiration of the thirty days limitation prescribed by the act; and for this reason the board of examiners refused to consider them.

Thomas Wells, for Relator.

I. The intent of the legislature is to govern. The object of the act was to provide for the payment of *all* the claims therein specified. 4 Nev. 45, 174, 241; 5 Nev. 283; 3 How. 556; 6 Nev. 68; 6 Cranch, 307.

II. As to when a law is merely directory, see: 4 Cal. 275; 14 Cal. 155; 15 Cal. 223, 387; Smith's Com. 782; 3 Mass. 232; 6 Wendell, 486 and note; 6 Hill, 646; 5 Cowan, 269; 11 Wendell, 604; 12 Wendell, 481; 12 Conn. 242.

L. A. Buckner, Attorney General, for Defendants.

By the Court, LEWIS, C. J.

By Section 2 of an act of the legislature, approved March 6th, 1871, it is provided that "Any person, having an unsatisfied *bona fide* claim against Peter Cavanaugh, for labor actually performed, money or material actually furnished, services rendered, or expenses necessarily incurred for, and actually used in, the construction or completion of the state capitol at Carson, which claim has not been paid or secured, either in whole or in part, by warrants or orders for warrants upon the treasury, shall present the same to the State Board of Examiners, within thirty days after the passage of this act, itemized and duly verified, for their action as provided by law." The plaintiffs, having claims of the character here designated, presented them to the board, who refused to allow the same because not presented within thirty days after the passage of the act. A writ of mandamus is now asked to determine the question,

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whether a claim not presented within the time designated legally be allowed by the examiners.

We are of opinion that the limitation as to time is a provision of the act, and therefore that it must be complied with. It should never be held that any specific requirement of the statute may be dispensed with, except when it is clearly manifest that the legislature did not deem a compliance with it material, or that it appears to have been prescribed simply as a matter of form for the province of the courts to enforce the will of the legislature as expressed in the statutes. If it is evident from the ordinary grammatical construction of the words used, that it intended that the right should be enjoyed only upon some specified conditions, that it gave no power, in the courts or elsewhere, to dispense with the requirement imposed, or to hold that a thing which it deemed essential to be done at one time, may nevertheless be done at another.

If a requirement of a statute is held to be directory, and that compliance is material to be followed, it is upon the assumption that the legislature itself so considered it, and did not intend to make the right conferred dependent upon a compliance with the form prescribed for securing it. It is upon this principle that the courts hold that the time designated in a statute, where a thing is to be done, is directory. No court, certainly, has the right to hold an amendment of a law unnecessary to be complied with, unless it is manifest that the legislature did not intend to impose the consequences which would naturally follow from a non-compliance, or which would result from holding the requirement mandatory, or indispensable. It must be clear that no penalty was intended to be imposed for a failure to comply, then, as a matter of course, it is but carrying out the intention of the legislature to declare the statute in that respect to be directory. But if there be anything to indicate that the legislature intended that full compliance with it must be enforced.

There is no evidence here that the legislature did not intend to require a strict compliance with all the conditions of the statute in question. But, on the other hand, in making a distinction between the claims provided for by it and ordinary demands on the state, requiring them to be presented to the board within the designated time, the only natural presumption is that the li

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to time was imposed with some purpose, and was deemed material and necessary to be followed. If the time were not thought essential, why not place these claims on the same footing as others, by simply providing that they might be presented to the board of examiners for its action, as is done in the case of other demands, with no specified limitation? Again, the assumption by the state of these claims, which were held against Peter Cavanaugh, and which were legal demands against him only, was entirely gratuitous. Without the act in question, the board of examiners would have had no authority or right to allow or act upon them, and it is only authorized to act upon or allow such claims as were presented within thirty days from the passage of the act. Whence the authority, then, to act on such as were not so presented? The board's authority in this respect is limited to the consideration of such demands as were presented within the time; hence, it has no more right to allow such as were not so presented, than it would to allow them if the act in question had never been passed. The jurisdiction, so to speak, of the board, is confined to the consideration of claims of a designated character; and those which do not come within the class named, whether in respect to the time when presented, or in any other respect, are not such as the act has provided for, and are therefore beyond its power or control. The presentation within the thirty days is clearly a condition upon which the authority of the board to consider them is made to rest; if, therefore, the condition be not complied with, the authority of the board fails. Mandamus refused.

JOHN WOOD, *et al.*, APPELLANTS, *v.* CHARLES E. OLNEY,
et als., RESPONDENTS.

JOINT JUDGMENT—AFFIRMANCE IN PART AND REVERSAL IN PART. Where a joint demurrer to a complaint was sustained and judgment entered for defendants dismissing the action; and on appeal it appeared that the demurrer was not well taken as to one of the defendants: *Held*, that as to such defendant the judgment should be reversed, and affirmed as to the others.

JOINT DEMURRER—SEPARATE ORDERS THEREON. A joint demurrer may be sustained as to one defendant, and overruled as to another.

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JUDGMENT FOR SEVERAL NOT ALWAYS AN ENTIRETY. The rule that a joint judgment has to be reversed in toto, if not good as an entirety, does not apply under our statutes and system of practice.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action commenced by John Wood and Edward B. Kenyon, partners doing business in California under the firm name of Wood & Kenyon, against Charles E. Olney, The Washoe Gold and Silver Mining Company, Imperial Silver Mining Company, B. W. Pyle and a great number of other defendants, on two certain promissory notes, one for \$4,000 and the other for \$3,000, signed by various of the members of the firm of Olney & Co., and intended, as was alleged, to bind the said firm as a company. The second note was also signed "Olney & Co." The complaint, which was lengthy, set out among other things that the Washoe Gold and Silver Mining Company was a corporation organized under the laws of the State of California, and that it was a partner in the firm of Olney & Co., and that the Imperial Silver Mining Company was also a corporation organized under the laws of the State of California, and that it was a consolidated company formed to embrace and embracing all the affairs and business of Olney & Co., the Washoe Gold and Silver Mining Company and others, and all their mines and mining interests. It also asked for an injunction to restrain transfer of stock of the Imperial Company, and for other relief. The defendants, the Washoe Gold and Silver Mining Company, Abner H. Barker, D. A. Jennings, W. H. Gauley, Nathaniel Page, Wm. Carman, A. B. Paul, W. B. Bourne, W. H. Howland, Nathaniel Gray, J. H. Atkinson, W. A. Wade, G. H. Gray and Samuel Merritt, joined in one demurrer, and the Imperial Silver Mining Company put in a separate one. None of the above named parties had signed either of the notes, and none of them except the Washoe Company were alleged to be partners in the firm of Olney & Co. The demurrers being sustained, and the plaintiff failing to amend, there was a judgment in favor of all the defendants so demurring, dismissing the action as to them, from which judgment this appeal was taken.

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W. E. F. Deal and *R. S. Mesick*, for Appellants.

I. That the complaint states a cause of action against the Washoe Gold and Silver Mining Company, we think is plain. *Catskill Bank v. Gray*, 14 Burt, 471.

II. The joint demurrer of all the defendants except the Imperial Company was too broad; and the order sustaining it, and the judgment thereon, were erroneous. *People v. The Mayor of N. Y.*, 28 Barb. 251; *Woodbury v. Sackrider*, 2 Abb. Pr. R. 402; *Webster v. Tibbetts*, 19 Wis. 438.

III. The Imperial Company demurred separately, yet its demurrer was acted upon and sustained jointly with that of the other defendants, and one judgment was entered in favor of all, against plaintiffs. Such being the case, the judgment must be set aside as to all the other defendants. Being a joint judgment for all the defendants, it seems to us impossible that it can stand as a separate judgment in favor of one.

IV. The Imperial Company, both at the hearing and on demurrer, and in the order and judgment following, assumed a joint position with the other defendants, and should be considered as having thereby waived any advantage of a separate standing.

V. The first note was made by the parties who signed for themselves, and on behalf and on the responsibility of all the partners of Olney & Co., with full authority from the partners to do so and bind them as such partners, and also to bind the firm of Olney & Co. The second note was signed by Olney & Co. The money borrowed was used in the business of the firm. The presumption is, that it was the note of the firm.

VI. The Imperial Silver Mining Company succeeded to all the business and property of Olney & Co., and carried on the same business that had been previously carried on by Olney & Co. There was no change except in name. In equity, the Imperial S. M. Co. is primarily liable to pay the debts contracted by Olney & Co. *Paxton v. Bacon M. & M. Co.*, 2 Nev. 260; *Angell & Ames on Corporations*, Sections 169 and 592.

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Thomas Sunderland and L. Aldrich, for Respondents.

I. There can be no recovery on the first note against any of the defendants, for the reason that none of them are parties to it. *Chitty on Contracts*, Chap. 2, p. 56–8; *Ripley v. Kingsbury*, Day, 150; *Jacquez v. Marquard*, 6 Cowen, 697.

The second note must also be disposed of under the same rule except, perhaps, the Washoe Gold and Silver Mining Company—being alleged that this corporation was a member of the firm Olney & Co., whose name appears as one of the makers of this note and except as to the Imperial Silver Mining Company, if it can be held liable on the ground that it succeeded to the rights and interests of the Washoe Gold and Silver Mining Company. The mere averment that there was an intention by the parties to the notes, at the time they were made, to bind persons other than those whose names appear to the notes, is entitled to no consideration.

II. Again, it is alleged that the Washoe Gold and Silver Mining Company is a California corporation; but there is no averment that the law of California at that time, nor at the times the notes were made, held stockholders liable for any portion of the indebtedness of the corporation. In order to hold the stockholders, it was necessary to have averred that the law of California created such liability—otherwise, the law of California would be presumed to be the same as that of Nevada, which recognized no such liability. *Greenleaf on Ev.* 664–6; 1 *Seld.* N. Y. 447; 15 *Cal.* 226; 31 *Cal.* 55; 21 *Cal.* 225.

III. As to defendants who are not parties to the notes, except so far as the two corporations are concerned, (they being regarded as foreign corporations, and always absent from this state) the alleged causes of action are barred by the statute of limitation.

IV. The Imperial Silver Mining Company is not responsible, unless by reason of its succession to the rights and property of the Washoe Gold and Silver Mining Company. The terms, character, conditions and considerations which led to the formation of the Imperial Company are not stated, nor does it appear who its stockholders were. The complaint should show conclusively that the change was merely a change in name. The law governing this question has been clearly

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down by this court. *Paxton et al. v. The Bacon Mill and Mining Company*, 2 Nev. 257.

7. We have treated the alleged partnership of Olney & Co. as it is, so far as the Washoe Gold and Silver Mining Company is concerned, because there is nothing in the complaint to disclose the character of its occupation or its powers. For the purposes of discussion, we admit the general doctrine that there is no prohibition in law to the formation of such partnerships, where the object is to effect the purpose of the incorporation.

8. The proposition of plaintiffs, that the joint demurrer, if there was a cause of action as to any of the defendants so joined, should have been overruled, cannot be sustained. It would be in direct conflict with our Practice Act, Sec. 148, which provides that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate right of the parties at each side, as between themselves. As to the authorities that have been cited in support of the proposition, we may remark that there was great diversity of opinion in the outset as to the proper construction of the New York Code of procedure, and great want of uniformity in the decisions upon it. The new system encountered the prejudices (if we may properly use that language) of the judges in New York, accustomed to the old system of practice. By reason of the existence of this opposition or dislike to the code, the old rules of law were reluctantly given up, and in some instances not at all, unless expressly abolished.

Mitchell & Stone and *G. H. Gray*, also for Respondents.

By the Court, GARBER, J.

We think the complaint shows a cause of action against the Washoe Gold and Silver Mining Company, but none against any of the other respondents. It is contended, that it also shows a cause of action against the Imperial Company; but the case of *Paxton v. Bacon Co.*, 2 Nev., decides the point adversely to the plaintiffs.

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Decisions are cited to show that as all the respondents, except the Imperial Company, demurred jointly, the demurrer was broad, and should therefore have been overruled as to all. The case in 20 Barb., cited in 19 Wis., would seem to be an authority that, even if, for the reason here urged, the demurrer was improperly sustained as to any of the parties, we should only reverse judgment as to that respondent against whom the complaint stated a cause of action. But we do not go upon that, for we think the demurrer should have been sustained as to all those joining in it except the Washoe Company. The cases cited by the appellants are evidently founded upon the analogy supposed to be afforded by the rule that: "If there be several distinct assignments of breach, some of which are sufficient and the others not, or if a declaration contain several counts and one only be bad, on demurrer to the whole declaration, the court will give judgment for the plaintiff." 1 Chitty Pl. 165. But this was not the common law rule; it seems it is not the law in England now. At common law such a demurrer—that is, one too large as to the matter demurred to—the judgment was, that the plaintiff should recover upon the good counts as were good, or such breaches as were well assigned, and should be barred as to the residue. Afterwards, the practice stated by Chitty, was borrowed from the courts of equity, and sustained until the simpler and more sensible common law practice giving judgment on the whole record according to the truth was restored. *Duppa v. Mayo*, 1 Saunders, 285 (b), 286, (9); *Pinckney v. Inhabitants*, 2 Ib. 379, 380, note (14); *Myers v. Dig. Pleader*, C. (32), Q. (3); *Hinde v. Gray*, 1 Man & Gr. 195, note (a); *Slade v. Hawley*, 13 M. & W. 756. I never, the rule that a demurrer too large as to the matter demurred to should be overruled *in toto*, has been generally if not universally followed in the United States; and it is not necessary, in this case, to deny that in adopting the common law as a rule of decision, and adopting, as part of it, an innovation so sanctioned by time and authority.

But, even granting this, it does not follow that the same rule should be applied to a demurrer, good as to one and bad as to one joining in it. It is said by Chief Justice Spencer, speaking of a

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plea of the general issue, to which the remark is no more apposite than to a joint demurrer, that "the rule is a very artificial one and ought never to be extended beyond the very cases to which it has been applied," (*Higby v. Williams*, 16 Johns. 216) and the courts of equity, while recognizing the rule that as to the matter demurred to a demurrer cannot be good in part and bad in part, have uniformly refused to extend it to a demurrer like this—the settled equity doctrine being that a joint demurrer may be sustained as to one defendant and overruled as to another. *Mayor, etc. v. Levy*, 8 Vesey, 403; *Wooden v. Morris*, 2 Green's Chy. (N. J.) 65; *Barstow v. Smith*, Walker's Chy. Rep. 397. On this principle alone, the cases cited by the appellants and the somewhat earlier ones upon which they rest, should have been, in our opinion, differently decided. We infer from the remarks of Lord Eldon, in *Mayor v. Levy*, that prior to our revolution the rule invoked was never extended, either at law or in equity, to the case of a joint demurrer too large as inapplicable to some of the parties joining; and so far as we are advised, all the American cases in which it has been so extended are bottomed solely on the authority of very recent New York cases, none of which were decided in or have been approved by the courts of last resort in that state.

We see no reason why we should follow this new departure, and we are not inclined to extend so arbitrary and technical a rule further than we are compelled to do by the authority of decisions binding upon us. We are satisfied that, under our statute, the position that the judgment, being joint, must be reversed *in toto*, if not good as an entirety, is untenable. The case of *Ricketson v. Richardson*, 26 Cal. 149, is in point, and with the views there expressed we fully agree.

The judgment should be reversed as to the Washoe Gold and Silver Mining Company, and affirmed as to the other respondents, and the judgment of this court will be entered accordingly.

WHITMAN, J., did not sit in this case.

Cooper v. Pacific Mutual Life Insurance Company.

SARAH J. COOPER, APPELLANT, v. THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, RESPONDENT.

DISMISSAL OF APPEAL "WITHOUT PREJUDICE." Where it appeared upon appeal that the statement sent up had not been settled by the judge below; and on appellant's motion for leave to withdraw it for correction, the appeal was dismissed "without prejudice," and after correction the case was again taken up: *Held*, that the dismissal of the first appeal did not operate as an affirmation of the judgment or prevent the second appeal.

CONSIDERATION ON APPEAL OF EVIDENCE EXPLAINING POINTS OF LAW. Though the Supreme Court cannot, where there has been no motion for a new trial, weigh the evidence for the purpose of determining whether a verdict or judgment is sustained by it, yet any question of law arising at the trial and properly excepted to can be reviewed without a motion for new trial; and in such case as much of the evidence as may be necessary to explain the legal question may be taken up and considered.

APPEAL ON RULINGS—MOTION FOR NEW TRIAL NOT NECESSARY. A motion for a new trial is not only unnecessary to authorize a review of rulings at the trial but the much preferable practice is to take them up by bill of exceptions and statement on appeal.

MATTER OF NON-SUIT A QUESTION OF LAW. Whether a case should be withdrawn from the jury and the plaintiff be non-suited is purely a question of law.

INSURANCE—VALID CONTRACT BEFORE ACTUAL DELIVERY OF POLICY. When a wife made application to the agent of an insurance company for a policy on the life of her husband, and paid fifty dollars in accordance with the company's rules, which was to be applied to the first year's premium provided the risk should be taken; and in due time a policy was made out and forwarded to the agent for delivery; but before it was delivered the husband died, whereupon the agent, though tendered the balance of the premium, refused to deliver the policy. *Held*, that there was a valid contract for a policy; that upon the taking of the risk the fifty dollars became the property of the company, and the assured became entitled to the policy; and that such a contract was available to sustain an action for the amount of the insurance as if the policy had been delivered.

APPEAL from the District Court of the First Judicial District of Storey County.

The defendant is a corporation organized under the laws of the state of California, and having its principal place of business in the city of Sacramento in that state. The application for insurance was made at the town of Winnemucca, Nevada, in October 1892.

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policy appears to have been issued at Sacramento, California, on or about November 5th; and James A. Cooper, the husband of plaintiff, died November 7th, 1870.

R. S. Mesick, for Appellant.

I. Any former appeal not having been decided upon the merits, nor dismissed under Rule 3 of this court, this appeal must stand and be considered upon its merits. *Martinez v. Gallardo*, 5 Cal. 155; *Osborne v. Hendrickson*, 6 Cal. 175; *Karth v. Light*, 15 Cal. 324; *Langley v. Warner*, 1 Comst. 606; *Watson v. Husson*, 1 Duer. 252; *Marshall v. The Milwaukee and St. Paul Railroad Co.*, 20 Wis. 604.

II. The ruling upon the motion for non-suit can be reviewed in the same manner as any other ruling made during the trial, and a motion for new trial was unnecessary. *Darst v. Rush*, 14 Cal. 81; *Sullivan v. Carey*, 17 Cal. 81; *Levy v. Getleson*, 27 Cal. 688.

III. The refusal of defendant to deliver a policy, and its denial of all obligations so to do, operated as a waiver of the condition, such as time and place of payment, and time and character of notice and proofs of death—of which it might have availed itself in defense, had it issued and delivered the policy to plaintiff. *Taylor v. Merchants' Fire Insurance Co.*, 9 How. 403; *Post v. Aetna Insurance Co.*, 43 Barb. 351; *New England Fire and Marine Insurance Co. v. Robinson*, 25 Ind. 536; *Fried v. Royal Insurance Co.*, 47 Barb. 127; *O'Niel v. Buffalo Insurance Co.*, 3 Comst. 124; *Norwich and N. Y. T. Co. v. Western Mass. Insurance Co.*, 34 Conn. 561.

IV. A valid agreement between plaintiff and defendant made prior to the death of plaintiff's husband, to insure his life in her favor and deliver her a policy, was clearly shown by the pleadings and evidence. *Union Mutual Insurance Co. v. Commercial M. Insurance Co.*, 2 Curtis' C. C. 524; *Trustees, etc. v. Brooklyn Fire Insurance Co.*, 19 N. Y. 305.

V. The risk upon the life of Cooper commenced prior to his death, and at least as soon as plaintiff's application was received and accepted by defendant if not at the time of application and

receipt of plaintiff's fifty dollars. *Audubon v. Excelsior Insurance Co.*, 27 N. Y. 216; *Commercial M. M. Insurance Co. v. Union Mutual Insurance Co.*, 19 How. 318; *The City of Davenport v. Peoria M. and F. Insurance Co.*, 17 Iowa, 276; *New England F. and M. Insurance Co. v. Robinson*, 25 Ind. 536; *Trustees of First Baptist Church v. The Brooklyn Fire Insurance Co.*, 19 N. Y. 305; *Fried v. Royal Insurance Co.*, 47 Barb. 127; *Post v. Aetna Insurance Co.*, 43 Barb. 351; *Perkins v. Washington Insurance Co.*, 4 Cow. 645.

Mitchell & Stone, for Respondent.

I. This appeal will not be considered, for the reason that the action has been appealed before, and upon motion of appellant an order of dismissal entered. The dismissal of the first appeal no longer leaves the case open for review. *Karth v. Light*, 15 Cal. 326; *Chase v. Brand*, 29 Cal.; *Harrison v. Bank*, 3 Marsh, 375.

II. There was no motion for new trial, and the appellate court will therefore not review the evidence as contained in the statement, the court below not having first had an opportunity to review its own errors, if any were committed. *Van Vleet v. Olin*, 4 Nev. 95; *Biddle v. Barker*, 13 Cal. 295; *Duff v. Fisher*, 15 Cal. 380; *Green v. Butler*, 26 Cal. 599; *Allen v. Fenton*, 27 Cal. 68; *Harpur v. Minor*, 27 Cal. 110; *Gagliardo v. Hoberlin*, 18 Cal. 395; 27 Cal. 475.

III. The contract of insurance was not complete with the soliciting agent, (waiving any objection as to his power to bind defendant) because it was dependent on contingencies—that is, discretion resting in defendant, at any time prior to the delivery of the policy, to return the fifty dollars deposit and withhold the policy. *St. Louis Mutual Life Ins. Co. v. Kennedy*, 6 Bush. 450; *Mutual Life Ins. Co. v. Burse*, 8 Georgia, 534.

IV. It being here contended that the contract was complete, and that the court should decree the payment of the risk, the policy alleged to have been issued should have been introduced, showing the terms, conditions, covenants, and warranties upon which the risk should be decreed to be paid; also proof introduced to show a

iance on plaintiff's part with the terms and conditions therein
ned. *Kate Healy v. Imperial Fire Ins. Co.*, 5 Nev. 268;
Muser v. North British Ins. Co., 6 Nev. 15.

the Court, LEWIS, C. J.:

appeal was brought in this case, but upon discovering that
statement prepared was not settled by the judge below, as re-
l, the appellant moved for leave to withdraw it for the pur-
of correcting the omission. In conformity with the application,
der was made by this court dismissing the appeal without prej-
. The statement being corrected, the case is again brought
ut it is argued for the respondent that the dismissal of the
appeal operated as an affirmance of the judgment, and there-
n appeal cannot again be taken.

is objection is clearly not tenable. It has been held, it is true,
he dismissal of an appeal for the want of prosecution, or upon
erits, operates as an affirmance of the judgment. *Karth v.*
1, 15 Cal. 326. But in that very case it was held that if the
sal be upon some technical defect in the preparation of the
l, it has no such effect, the court saying: "The cases in
the dismissal of an appeal will not operate as a bar to a
d appeal, are those where the dismissal has been made upon
technical defect in the notice of appeal, or the undertaking,
e like. The bar applies where the dismissal is for want of
ution, and the order is not vacated during the term, or the
sal is on the merits." This is the extent of the rule laid
in the cases relied on by counsel. It is also doubtful whether
modified it can be maintained as a correct rule of law, for it
een held otherwise by courts of undoubted ability. 20 Wis.
1 Duer, 252.

t whether it can, or not, need not be determined here, for it
dent this case comes within the rule followed in *Karth v.*
t. The appeal was not dismissed for want of prosecution, or
the merits, but solely for the purpose of correcting an error,
pplying an omission which had happened in its preparation.
o, the order of dismissal expressly provided that it was made
ut prejudice to another appeal. This of itself is a sufficient

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answer to the objection of counsel, independent of any other consideration.

The questions submitted for decision upon the record are, first whether the evidence is brought up in such a manner that it may be reviewed; and if so, then second: whether the court below ruled correctly in taking the case from the jury and non-suiting the plaintiff. The plaintiff appeals from the judgment alone, no motion for new trial having been made. A statement on appeal was prepared, which embodied the evidence introduced on behalf of the appellant; the motion for non-suit — together with the exceptions to the action of the court in granting it. Respondent now argues that the enquiry of this court must be confined to the judgment roll alone, as the evidence cannot be considered except where motion for a new trial has been made. It is true, this court cannot weigh the evidence for the purpose of determining whether a verdict or judgment is sustained by the evidence; but any question of law arising at the trial and properly excepted to can be reviewed without a motion for new trial, and in such case so much of the evidence as may be necessary to explain the legal question should be brought up and considered.

It is never held that a mere question of law cannot be reviewed except when a motion for a new trial has been made. Nor can it, with any degree of plausibility, be argued that such is the rule. It is the every-day practice under the new system, as well as old, to take cases to the appellate courts upon bill of exceptions upon which all rulings raising legal questions may be reviewed. Will it be argued, for example, that a question growing out of instructions or charge to the jury cannot be reviewed, except when a motion for new trial is made? Certainly not; and still it is almost invariably necessary in such cases to review some of the evidence to enable the appellate tribunal to obtain an understanding of the question. Indeed, so it is with nearly every question of law raised at the trial; it can only be understandingly brought to the attention of the court of review by presenting the evidence bearing upon and illustrating it. A motion for new trial is not only unnecessary to authorize a review of rulings at the trial, but the more preferable practice is to bring them up by bill of exceptions, or

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a statement on appeal, as the same object is accomplished without the expense and unnecessary labor of such motion. Thus, a party who wishes only to have the questions of law arising during the progress of the trial reviewed, may introduce the rulings, with sufficient evidence to point them, into his statement on appeal, or prepare a bill of exceptions as he proceeds, and so bring them to the attention of the appellate court. This is a practice which, under similar statutory provisions, has not only received the sanction, but commendation, of the Supreme Court of California. *Brown v. Tolles*, 7 Cal. 398; *Harper v. Minor*, 27 Cal. 107; *Carpenter v. Williamson*, 25 Cal. 158.

Whether a case should be withdrawn from the jury and the plaintiff non-suited, is purely a question of law. When properly made, it is simply a decision that the law affords no relief upon the evidence adduced, admitting every fact and conclusion which it tends to prove. It is not a decision upon the weight of evidence where it is conflicting, but that it is not sufficient to justify its submission to the jury. If it were not a question of law, a non-suit could never be granted; for the judge can only decide questions of law. But independent of reason, such is undoubtedly the law. *Pratt v. Hull*, 13 John. 335. If so, this point is settled, for there is no difference between this and any other law question as to the manner in which it may be submitted to the appellate court. Being simply a question of law, it could be brought to this court as well by bill of exceptions, or by statement on appeal, as by appeal from an order on motion for new trial.

Was the court warranted in granting the non-suit? Clearly not. The plaintiff introduced evidence going to prove that an application was made to the agents of defendant for a policy of insurance on the life of the plaintiff's husband; that at the time the application was made, fifty dollars was paid, according to the regulations of the company, which was to be applied on the first year's premium, provided the defendant should conclude to make the insurance. The application thus made was forwarded to the proper office of the company; a policy was in due time made out and forwarded to the agent in this state for delivery; but the insured having died before

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it was delivered, the agent refused to deliver it, although demanded, and the balance of the premium offered to be paid.

Here is undoubtedly sufficient proof to establish a contract for a policy. The application for a policy by the assured, with the payment of a portion of the premium, and acceptance of the risk by the defendant, left nothing to be done but the delivery of the policy and the payment by the plaintiff of the balance of the premium, which, it appears, was not required by the rules of the company until the completion of the transaction. These facts show a valid contract for a policy between the parties. The moment the company concluded to make the insurance, the fifty dollars paid to the agent became its property, without any further action on its part. It was paid upon the condition that if the company concluded to make the insurance, it should be applied in payment of the premium; when, therefore, the risk was taken, it became the property of the defendant, and at the same time the assured became entitled to the policy. Thus there was the acceptance of the application by the company, and the payment of a portion of the premium, consideration therefor, by the plaintiff, which is all that was necessary to make a valid contract between the parties. Such contracts are as available to sustain an action for the amount of the insurance as if the policy itself had been issued. In *Kohne v. The Insurance Company of North America*, 1 Washington C. C. 93, a person applied to the agent of the company to effect an insurance on goods on board a ship, and settled all the terms of the insurance, but did not receive a policy. It was, however, soon afterwards filled out and executed, and about the same time the company received intelligence of the loss of the vessel. On a subsequent day the assured called to pay the premium and receive the policy, but the company refused to deliver it, objecting that the agreement was inchoate, and consequently it had the right to retract. Judge Wellington, however, said: "It appears everything was agreed upon and although, on account of the fever then in the city, he did not wait to receive the policy, yet it was immediately after he left the office filled up and signed by the president, and has been introduced on the trial; the contract therefore was not inchoate,

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perfected before notice of the capture by either party." So it has frequently been held that the premium may be received on a mere contract to insure, where no policy has been made out; and such, we take it, is the law. *Carpenter v. The Mutual Safety Insurance Company*, 4 Sandf. Ch. 408; *Hamilton v. Lycoming Insurance Company*, 5 Barr, 339; *Andrews v. The Essex Fire and Marine Insurance Company*, 3 Mason C. C. R. C; *McCullough v. Eagle Insurance Company*, 1 Pick. 278; *Palm v. Medina Insurance Company*, 20 Ohio, 529; *Taylor v. Merchants' Fire Insurance Company*, 9 Howard, U. S. 390.

The non-suit must be set aside.

Judgment reversed. It is so ordered.

C. B. PRATT, RESPONDENT, v. H. F. RICE *et als.* APPELLANTS.

MOTION "NOT OF COURSE" ORDINARILY TO BE ON NOTICE. Where an ex parte motion was made in 1871 for the docketing, *nunc pro tunc*, of a judgment rendered in 1866, against defendants who had appeared; and it became necessary on the application to determine several questions of fact: *Held*, that such a motion should not be entertained except on notice to the opposite party, and that the refusal to vacate an order obtained under such circumstances was error.

NOTICE OF MOTION, WHEN REQUIRED. When the nature of a motion, involving the determination of facts, is of a kind to prevent the performance of some act which, if performed, might be productive of irreparable injury, and it becomes desirable that the party to be affected should have no previous intimation thereof, it may be granted an affidavit without notice to the opposite party: but when there is no such danger, notice should be given.

RIGHT OF PARTY TO NOTICE OF MOTION. If on a motion there is no good cause for haste or concealment, and facts are to be found in the ascertainment of which the opposite party is deeply interested, such party has a right to notice and an opportunity to be heard.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

It appears that a judgment and decree of foreclosure were rendered in this action on March 19th, 1866, for \$4,000 principal,

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\$1,882.66 interest, accruing interest and costs. An order sale was issued, and in September, 1866, the mortgaged property was sold for \$50. On March 6th, 1871, upon *ex parte* application of plaintiff, the following order was entered: "Upon filing motion of A. C. Ellis, Esq., attorney for plaintiff, and the affidavit of Thomas J. Edwards, it is upon the motion of A. C. Ellis, Esq., attorney for the above named plaintiff, made in open court this 5th day of March, A. D. 1871, and upon the aforesaid affidavit of Thomas J. Edwards, filed and used upon the hearing of said motion, hereby ordered that the clerk of this court enter a credit upon the judgment and decree rendered and entered in the above cause on the nineteenth day of March, 1866, of fifty dollars, the amount of the proceeds of a sale duly made under and by virtue of an execution issued out of this court in the above entitled cause on — day of — 1866, and that he docket as of date September 12th, 1866, a judgment in favor of plaintiff and against the defendants, in accordance with law and said decree, for the sum found due to the plaintiff from the said defendants in said decree, after giving the said credit of fifty dollars."

The affidavit of Mr. Edwards showed that the sale had taken place on September 11th, 1866; that the property had sold for only \$50; and that afterwards, the order of sale had been misplaced and consequently had never been returned to the clerk's office.

R. S. Mesick, for Appellant.

I. The order of the district court should have been set aside upon motion of defendants, because—1. The application was a special motion. 3 Dan. Ch. 2 ed. 1854. 2. It called for a consideration and determination of substantial rights of defendants. The sheriff having made no return, it would seem not unreasonable to afford defendants an opportunity of knowing how property bought for \$4,000, and mortgaged for \$4,000, came to sell for \$50. Obviously defendants were entitled to notice of the motion. It was not competent for the plaintiff to take the proceeding *ex parte*, nor for the court to hear and determine the matter upon an *ex parte* application. Practice Act, Sec. 499; 1 Burrill's Prac. 345; Tidd's Prac. 512; *Stevens v. Ross*, 1 Cal. 96; *Hungerford v. Cush*

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8 Wis. 320 ; 1 Paige, 39 ; 4 Paige, 551 ; 5 Mich. 283 ; 22 Wis. 131.

II. The showing made by plaintiff, in support of his application, **was** insufficient to justify the order ; no fact was sworn to positively ; **the** affidavit of Edwards did not show that anything remained due **on** the decree ; there was no return by the sheriff of his proceedings **on** the order of sale, nor any fact presented obviating the necessity **of** such return.

A. C. Ellis, for Respondent.

I. The affidavit of the sheriff served all the purposes of a technical return, and was equivalent to a substituted return, or order of sale. The order of sale might have been substituted without notice. *Benedict v. Cozzins*, 4 Cal. 381 ; *Bryant v. Stidger*, 17 Cal. 270 ; 7 Cow. 470 ; *Burns, Assignee, v. Burns*, 7 Conn. 470.

II. Whether there has been any sale of the mortgaged property under the decree, whether it has been conducted substantially in compliance with the law, what amount the property brought, whether **the** other property of defendants should be burdened with a lien, **and** how it is that property mortgaged for \$5,000 should only bring \$50—all these things arise upon the return itself. And yet the defendant has no right to question its truth or falsity, nor to make **these** inquiries, until after the judgment is docketed. If the sheriff **has** made a false return, the party may commence suit against him **and** his bondsmen. If he makes a mistake, or commits an error in **his** return, it may be corrected by the court, which always has control of its process.

III. The parties had their day in court ; jurisdiction had been acquired ; and this proceeding is of course, no notice being required either by the code or any rule of court. 2 Wendell, 254 ; *Close v. Gillespy*, 3 John. 525 ; 3 Cowen, 39 ; 17 Pick. 106 ; 2 Foster, 27 ; 2 Gillman, 584.

By the Court, WHITMAN, J. :

On the nineteenth of March, 1866, a decree of foreclosure was rendered in the district court against appellants, who had duly ap-

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peared, and in favor of respondent. Upon the order of sale in the case, no return was made.

On the sixth of April, 1871, *ex parte* application was made for an affidavit and certain entries upon the clerk's docket, for the setting of a judgment *nunc pro tunc* against appellants. Upon motion it became necessary for the court to hear and decide several questions of fact. The order prayed was granted.

Upon the twelfth of April, 1871, appellants moved, on notice, to vacate the order thus made, upon the grounds that it was made without notice, and without sufficient showing of facts. The Practice Act of this state, "after appearance, a defendant or attorney shall be entitled to notice of all subsequent proceedings in which notice is required to be given." Stats. 1869, Sec. 10. There is nothing further in the Practice Act touching the giving of notice in motions of the nature of the one under consideration. It is neither specially required nor excused, nor does there seem to be any rule of court upon the subject; consequently, resort must be had to generally received practice.

It is said by Mr. Daniell that "a motion is either of course, or special. A motion of course is, for an order which, by some standing rule or known practice of the court, may be granted, without hearing both sides; and a motion special—*i. e.*, for an order which is not a matter of course, and can only be granted under special circumstances, upon notice duly served upon the opposite party. A motion of course requires no notice. * * A special motion is one which it is not a matter of course to grant, but which the court, in the exercise of its discretion, may, on the facts established in support of the application, either grant or refuse. Motions of this description may be made either *ex parte*, or upon notice. When made *ex parte*, as in the case of motions for a *ne exeat regni*, or an injunction to stay waste, etc., they must be supported by an affidavit of the party applying for them, and by such collateral affidavits as may be necessary to make out a sufficient case against the interference of the court.

"The object of motions of this nature is generally to prevent the performance of some act which, if performed, might be productive of irreparable injury; and it is therefore desirable that the

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affected by it should not have any previous intimation of the intention to apply to the court to restrain him. Where there is no danger that the object of the motion would not be defeated, if notice were given, they will not be permitted * * and special applications concerning the proceedings in the cause, not regulated either by the general orders or by any clearly defined rule of practice, must almost always be made upon notice." Dan. Ch. 2 ed. 1854-5.

The reason of the rule is against the practice pursued in this case; this was not an order of course. There was no cause for haste or concealment; facts were to be found, in the ascertainment whereof the appellants were deeply interested; a record of the court which was to bind them was to be substituted after a lapse of years, mainly, if not entirely, from the memory of one party; certainly, they had the right to know and see that this was correctly done, if it could be done at all. There is no reason in favor of the course pursued, and many against it; on its face, and unobjected to, it is, to say the least, extraordinary and irregular; and when objected to, it must be set aside.

The order of the district court is reversed.

THE STATE OF NEVADA, RESPONDENT, v. AH SAM AND
AH SEE, APPELLANTS.

INDICTMENT FOR BURGLARY CHARGING ALSO LARCENY. A indictment for burglary with intent to steal certain goods, which after stating the burglary goes on to allege the stealing of the goods, is not objectionable as charging two separate and distinct offences.

DEMURRER TO INDICTMENT—GROUNDS TO BE DISTINCTLY SPECIFIED. It seems that a demurrer to an indictment "that it charges two separate and distinct offences" is objectionable, for the reason that it does not distinctly specify the grounds of objection as contemplated by the statute relating to criminal practice. Stats. 1861, 465, Sec. 287.

APPEAL from the District Court of the Second Judicial District,
Douglas County.

The defendants, after the overruling of their demurrer, pleaded

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not guilty. Being convicted, they were sentenced to imprisonment in the state prison for four years. Their appeal was from the judgment.

George P. Harding, for Appellants.

The indictment charges with sufficient legal certainty two separate and distinct offences, which should not have been united in the same indictment under our laws. Stats. 1861, 465, Section 286, sub. 3. Under a criminal code similar to ours, it was held that an indictment in substance like this would be bad on demurrer. *People v. Garnett*, 29 Cal. 625 ; *People v. Burgess*, 35 Cal. 118.

L. A. Buckner, Attorney General, for Respondent.

By the Court, WHITMAN, J.:

Appellants were charged with the crime of burglary "committed as follows, to-wit: The said Ah Sam and Ah See did, at the residence of J. W. Averill, in the county of Douglas, state of Nevada, on the night of the seventeenth day of November, A. D. 1870, at eleven o'clock of the night time of said day, feloniously, burglariously, and forcibly break open and enter the said dwelling house of said J. W. Averill, with the intent the goods and chattels of him, said J. W. Averill, in said dwelling house then and there being, then and there feloniously and burglariously to take, steal and carry away ; and one clock of the value of eight dollars, and forty pounds of butter of the value of twenty dollars, and one lot of sugar of the value of fifteen dollars, and one lot of can fruit of the value of ten dollars, and one lot of candles of the value of five dollars, of the personal property of the said J. W. Averill, then and there the said Ah Sam and Ah See did feloniously steal, take and carry away " * * *.

The statute of this state defines burglary thus: " Every person who shall in the night time forcibly break and enter, or without force (the doors or windows being open) enter into any dwelling house, or tent, or any other house or building whatever, with intent to commit murder, robbery, rape, mayhem, larceny or other felony, or petit larceny, shall be deemed guilty of burglary " * * *.

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Stats. 1869, 65. So this indictment would appear to be good, unless open to the objection taken by appellant's demurrer, which is "that said indictment charges two separate and distinct offenses. The demurrer is in the exact language of the statute, but the same statute also provides that the "demurrer must distinctly specify the grounds of objection to the indictment, or it shall be disregarded." Stats. 1861, 465, Section 287.

It would, to say the least, be better practice to call the attention of the court to the exact point of objection. To say, that two offenses are charged, and there stop, is to put upon the court the duty, if the demurrer be regarded, of searching the indictment for the error, which is not its province. However that may be, it will be assumed for the purpose of this decision, as it was upon the argument of the case, that the demurrer objects that the indictment charges burglary and larceny. The district court overruled the demurrer, and that is charged as error.

To sustain this position reference is made to *People v. Garnett*, 29 Cal. 625, and *People v. Burgess*, 35 Cal. 118. It would be, perhaps, sufficient to say that the point did not arise in either of those cases; but yet, as their dicta are clearly with the appellants, they may be taken with the respect always due to the utterances of a learned tribunal. Yet the authorities, admitting the cases cited to be decisions in point, are all the other way. The cause of demurrer allowed by the statute is simply declaratory of the pre-existent general rule of practice in cases of felony, and under that rule, indictments like the present upon like objections made have uniformly been held good. 1 Wheaton Am. Crim. Law, Sec. 383; 1 Russell, 824; *Com. v. Tuck*, 20 Pick, 356; *State v. Ayer*, 3 Foster, N. H. 301; *Storps v. Com.*, 7 S. & R. 491; *Com. v. Hope*, 22 Pick. 1; *State v. Brady*, 14 Vt. 353; *State v. Squires*, 11 N. H. 37; *State v. Moore*, 12 N. H. 42.

Some of these cases discuss the subject very elaborately, and even if one should doubt, with Mr. Bishop, as to the absolute propriety of the result attained, still the matter must be regarded as settled law.

Therefore the district court committed no error, and its judgment is affirmed.

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CHARLES N. SCHULTZ *et al.*, APPELLANTS, v. WILLIAM
H. WINTER *et al.*, RESPONDENTS.

ORDER OF JUDGE NOT FILED WITHIN HIS TERM OF OFFICE. Where a district judge on the last day of his term of office made an order overruling a demurrer, which, however, was not filed until a week afterwards: *Held*, no valid order, and that the action of his successor in setting it aside and hearing the issue anew was proper.

ORDERS MADE IN VACATION NOT VALID TILL ENTERED. An order of a judge upon an issue of law, if it be a final judgment, may be entered in term or vacation; but such an order in vacation can have no vitality until it be at least delivered to the clerk for filing.

MULTIFARIOUSNESS OF COMPLAINT. Where a complaint set forth that plaintiffs had appropriated separate and distinct portions of the waters of a creek flowing through their respective lands, and that afterwards defendants had absorbed nearly the entire waters, to the damage of plaintiffs in a certain amount, and threatened to continue such absorption, and praying for damages, an injunction and a settlement of the various rights of plaintiffs by a general decree: *Held*, demurrable for multifariousness.

APPEAL from the District Court of the Second Judicial District, Douglas County.

This was an action brought by Charles N. Schultz, H. F. Dangberg, Henry Ross, Emanuel Penrod, A. W. Burrill and H. H. Bence as administrator of the estate of Wm. Wilford, deceased, against William H. Winter and John Noal, alleging a diversion of the waters of a small stream of water known as Clear Creek, and forming the boundary line between Douglas and Ormsby Counties, and praying relief as stated in the opinion. The official term of Hon S. H. Wright, as judge of the Second Judicial District, by whom the first order was made, expired with the year 1870; that of Hon. C. N. Harris, his successor, commenced with the year 1871.

Clayton & Davies, for Appellants.

I. In the trial of issues of law, the court is not limited as to the time of rendering decisions. Practice Act, Sec. 156. There was no more right to vacate the order overruling the demurrer than

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ere is for a judge to declare any judgment rendered by his predecessor in office a nullity, on motion, and order a trial *de novo*. The order overruling the demurrer could only be reviewed by appeal, assigning the ruling on it as error.

II. The amended complaint was not demurrable. It was not right to litigate the rights of the plaintiffs, *inter se*, to the waters of Clear Creek, but to establish that plaintiffs are entitled to all the water flowing, or that would flow in it, if not diverted by defendants. There is no misjoinder of parties, because plaintiffs have a common interest in the subject matter and object of the suit.

III. Where the parties joined as plaintiffs are all interested in the principal question raised in the bill, and the issues tendered are simple, and a multiplicity of suits may be avoided, a demurrer for multifariousness will not be sustained. There cannot be any inconvenience in litigating the rights as between the plaintiffs and defendants in this case, the grievances complained of being a common injury to all the plaintiffs. *Reed v. Gifford*, 1 Hopkins' Ch. 418; *Wilson v. Castro*, 31 Cal. 426; *People v. Morrill*, 26 Cal. 360; *Owen v. Frink*, 24 Cal. 178; *People v. Stratton*, 25 Cal. 244; 1 Peters, 305; 4 Peters, 202; 1 Barb. Ch. R. 63; 3 Barb. Ch. R. 432; 20 Pick. 368; 4 Allen, 341; 29 Miss. 350; Cowen, 682; 23 Maine, 269; 14 Conn. 32; 10 Georgia, 109; 1 Maine, 81; 1 Atk. 282; 18 How. U. S. 253; Story's Eq. Pl. Secs. 121 *et seq.*

Ellis & King, for Respondents.

I. The order of Judge Wright, overruling demurrer, filed after the expiration of his term of office, was irregular and void. *Champion v. Sessions*, 1 Nev. 478. If not, there may still subsist other valid orders in the case beyond the possibility of discovery by this court, waiting to be filed.

II. Persons having adverse or conflicting interests in reference to the subject matter of the litigation, ought not to join as complainants in the suit. *Grant v. Schoonhover*, 9 Paige, 257; *Le-*

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firt v. Delafield, 3 Edw. 34; *Alston v. Jones*, 3 Barb. 400; *Mc
selis et al. v. Morris C. & B. Co.*, 1 Saxton Ch. 38.

No two of the plaintiffs claim any common or united interest in the same water or quantity of water, nor any such interest in the use of such water. Nor do any two of them claim any right to the successive use of the same water. No two claim any joint or common interest in any lands. But their respective lands, as set up in complaint, are several and distinct, and their holdings adverse to each other, as well as to defendants.

There are as many subjects of litigation presented by the complaint in the case, as there are separate rights set up as existing in any one of the plaintiffs, in which any one of the other plaintiffs has no interest.

III. In the case at bar each plaintiff has the entire and exclusive right in some one subject of the litigation, *i. e.*, the particular quantity of water claimed by him. No two of them are interested in any one object or subject of litigation. There is certainly nothing in common between the plaintiffs in the case at bar, nor any common liability charged against the defendants.

By the Court, WHITMAN, J.:

In this case a demurrer was taken to the amended complaint of appellants, and submitted to the then presiding judge of the district court. An order overruling the same was made by him on the thirty-first day of December, 1870, which was filed on the seventh day of January, 1871, after the expiration of his term of office. Subsequently on motion, the court, his successor presiding, set aside such order, heard and tried the issue of law, and sustained the demurrer. This action is claimed as error, and it becomes necessary to pass upon that question; for if error, the whole phase of the case is changed.

The trial of an issue of law is a court proceeding; the order made therein, if a final judgment, may be entered in term or vacation and if anything less, may probably be also thus entered; but such an order, made in vacation, can have no vitality until at least it

delivered to the clerk for filing. That was not done, in this case, until the official term of the judge signing the same had expired, and when his authority had ceased; so, in effect, there never was any order. Therefore, the court had power to hear the demurrer anew, as was done.

The demurrer, among other points, raises substantially the objection that the complaint is multifarious. The complaint states that the several appellants had diverted from its natural channel and appropriated to their own use, separate portions of the waters of a creek flowing through their lands; that they had so appropriated, diverted, and used, for irrigating and other useful purposes, one, a hundred and fifty inches, another fifty inches, and so on; that subsequent to such appropriation, the respondents had absorbed nearly the entire waters of said creek, and thereby damaged appellants in the sum of twenty-two hundred dollars in the past; that the prospective damage of the present season would be thirteen thousand dollars; that the respondents threaten the continuance of such absorption; wherefore, a judgment for damages is prayed, and a perpetual injunction against the wrongful acts recited, and a settlement of the various rights of appellants, by a general decree.

It has been said, by many courts, that it is a somewhat intricate question to decide, when or not a complaint is objectionable for multifariousness; but it would be more difficult to suggest a pleading open to such objection, if this is not. The complaint not only fails to show any community of interest between the plaintiffs, but clearly negatives any common interest. They are all holding adversely the one to the other, by separate distinct claims of appropriation. They ask, not that the waters of the creek may flow over their lands in their natural channel, but that each appropriator may divert, use, and dissipate certain specified portions thereof. In that it differs from the case of *Reed v. Gifford*, 1 Hop. Ch. 416, where a preliminary injunction was ordered in favor of certain riparian owners, the court there saying: "The rights of the general complainants to their respective lands are indeed distinct; but the grievance in question is a common injury to all the complainants. The water in its natural descent from the lake becomes the property of each of the complainants successively; all the complainants thus have right

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in the same subject; and the nature of the case forms a community of interests in the complainants.”

The case at bar is more nearly analogous to the case of *Marselis et al. v. Morris Canal & Banking Company*, 1 Saxton Ch. 31, and may well be governed by the rule laid down, which clearly expresses what a court of equity will not allow in cases of this kind. “The court will not permit several plaintiffs to demand, by one bill, several matters perfectly distinct and unconnected, against one defendant; nor one plaintiff to demand several matters, of distinct natures, against several defendants. And according to this principle, I feel constrained to say that the bill cannot be sustained. There is no kind of privity between those complainants; there is no general right to be established as against this defendant, except the general right that a wrong doer is liable to answer for his misdeeds to the injured party; which surely does not require to be established by such a proceeding as this. The utmost that can be said is, that the defendant stands in the same relative position to all these complainants. There is no common interest in them all, certainly, in the point in issue in the cause; which is the rule in 2 Anst. 469. Nor is there any general right claimed by the bill, covering the whole case; which is the principle adopted by Lord Ridesdale, *vide ante*. Chancellor Kent’s rule is quite as broad as any authority will warrant; but it is not broad enough for the case now before the court. It requires that a bill against several persons must relate to matters of the same nature and having a connection with each other, and in which all the defendants are more or less concerned, &c.” And so, because the case came within the scope of no existent authority, nor of any rule which could be established upon principle, it was dismissed.

So here, for the same reason, there was no error in sustaining the demurrer and dismissing the bill. The order and judgment of the district court are therefore affirmed.

Bowker v. Goodwin.

JOHN S. BOWKER, APPELLANT, v. C. C. GOODWIN,
RESPONDENT.

STATEMENT NOT SHOWING ALL THE EVIDENCE—FACTS ASSUMED. Where there was no showing that the statement contained all the evidence on any fact involved in the case; *Held*, that the appellate court was bound to include every essential fact sufficiently proved.

FINDINGS ON APPEAL. Findings of fact can only be taken to the Supreme Court by embodying them in a statement properly certified.

ONE STAMP WHERE TWO INSTRUMENTS CONSTITUTE ONE TRANSACTION. Where a promissory note and agreement in relation thereto were executed together and constituted parts of one transaction; and the note was sufficiently stamped: *Held*, that the agreement required no separate stamp.

DIFFERENT INSTRUMENTS MAKING ONE CONTRACT. If two instruments bearing on the same subject matter are executed together as one transaction, they constitute but one contract.

FINDINGS—CONFLICT OF EVIDENCE AS TO COLLATERAL FACTS. The rule that the decision of a nisi prius court as to the sufficiency of proof will not be disturbed on appeal if there be a conflict of evidence, applies also to collateral facts.

EVIDENCE—VALUE OF DITCH STOCK. Where plaintiff sued on a promissory note, which it appeared was to be cancelled on the delivery to him of certain stock in a ditch company, conveying water to his ranch; and a failure to deliver such stock being shown and its value involved, plaintiff offered to show "the value of the stock as taken in connection with his ranch": *Held*, that he could only be allowed to show its market value.

MEASURE OF DAMAGES—FAILURE TO DELIVER STOCKS. The measure of damages, in cases where there is a conversion of or failure to deliver a certain number of shares of stock having no peculiar value, is their market value either at the time of the conversion, when it should have been delivered, or at the time of trial, according to circumstances.

APPEAL from the District Court of the Second Judicial District,
Washoe County.

The plaintiff in this action sued on the promissory note referred to in the opinion, demanding a judgment for the full amount thereof with interest. Defendant set up want of consideration, and that the only object of giving the note was to satisfy plaintiff of his intention to transfer the Truckee Ditch Company stock mentioned in the agreement executed with the note, and that such stock was only

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worth \$400. The plaintiff recovered judgment for \$400 ; but, ~~not~~ being satisfied therewith, took this appeal.

William Webster, for Appellant.

I. The parties having, by agreement, fixed the damages or val ~~ua~~ tion of the ditch stock, and defendant having evidenced such fixed valuation by executing to plaintiff his promissory note for the amount, he is estopped from setting up a rule of damages other than ~~that~~ expressed on the face of the note.

II. The note sued on is an absolute promise to pay, and may ~~not~~ be contradicted by parol evidence, excepting in cases of fraud, ~~or~~ where there may be a failure of consideration, neither of which ~~ap~~ appears in this case. *Aud v. Magruder*, 10 Cal. 282 ; *Shriver v. Lovejoy*, 32 Cal. 577 ; *Damon v. Pardow*, 34 Cal. 281.

III. The agreement, having no revenue stamps thereon, is void. It was also *nudum pactum*,—there having been no consideration therefor.

IV. If the agreement was valid, the most that could be claimed under it would be, the right of defendant to elect which ~~he~~ would do,—deliver the stock before or when the note became ~~due~~, or pay the money ; and having failed to deliver the stock, he ~~must~~ be presumed to have elected to pay the money. *Sedgwick on Damages*, 485.

V. Plaintiff should have been permitted to prove the value of ~~the~~ stock in connection with the ranch, there being no market value ~~for~~ the stock. *Sedgwick on Damages*, 421, and authorities cited ; *Masterton v. Mayor of Brooklyn*, 7 Hill, 62.

R. S. Mesick, for Respondent.

I. Neither the findings can be considered, as they are not ~~in-~~ cluded in the statement, nor can any insufficiency of the evidenc ~~be~~, because it is not shown that the statement contains all the evidenc ~~be~~. *Corbett v. Job*, 5 Nev. 201 ; *Sherwood v. Sissa*, 5 Nev. 353.

II. Exhibit " D " was offered and admitted only as part of ~~one~~

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ment, of which the note sued on was the other part. The was stamped, and that was sufficient for both parts of the one ment.

. The measure of damages was not what the identical stock worth, in connection with plaintiff's ranch, but what a like of such stock could have been bought for. The proof d that there was an abundance of it.

the Court, LEWIS, C. J. :

re are many assignments of error relied on and argued by l for appellant in this court which cannot be considered, be- not properly brought up. We have frequently held that no und by the court below will be reviewed here, unless it be by the statement on motion for new trial that all the evidence d to sustain it is embodied in the record, for *non constat* but was ample proof in support of it. This rule has been fre- r announced by the court, and uniformly followed from the its organization. *Sherwood v. Sissa*, 5 Nev. 349. There owing that the statement in this case contains all the evi- on any fact involved in the case; hence, by the rule just we are bound to conclude that every fact essential to make respondent's case was sufficiently proven.

in, it has been held that the findings of fact can only be t to this court by embodying them in a statement properly d. *Corbett v. Job*, 5 Nev. 201; *Imperial Silver Mining Barstow*, Id. 252. The findings in this case are not so t up, and therefore cannot be considered.

leaves nothing that can be inquired into except such ques- s may arise on the judgment roll, and such rulings at the were excepted to. It is not claimed that the former exhib- error, and only two exceptions are now relied on, namely: the court erred in admitting the agreement, Exhibit D, in ce; and secondly, in refusing to allow proof as to the value Truckee Ditch stock *in connection with the plaintiff's ranch.*" afford a full understanding of these points, it becomes neces-) state some of the facts detailed in the statement. It ap-

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pears that the plaintiff, Bowker, had agreed to sell to the defendant a certain ranch, the payments to be made in installments at certain periods. Possession was delivered, and the defendant continued in the enjoyment of the premises for a year or two. During that time the plaintiff purchased certain shares of stock in a company known as the Truckee Ditch Company, organized for the purpose of conducting water from the Truckee River for the use of certain ranches located in the vicinity of the ranch in question, and was situated such that the water from it could be brought to the ranch premises. The defendant having failed to make the payments for the ranch in accordance with the agreement between the plaintiff and defendant, possession was surrendered, the contract of sale was annulled, and in the settlement of the affairs between them the defendant executed a note sued on was executed by the defendant. On the note appears by its date, the plaintiff executed and delivered to the defendant the following instrument, to wit: "I hereby agree to transfer whenever C. C. Goodwin transfers ninety-odd shares of Truckee Ditch Company stock now standing in the name of L. P. Bowker to me on the company's books, free from all charges, then to deliver and render a certain note which I hold against him for the sum of eighteen hundred and sixty-six dollars payable in legal tender or fourteen hundred dollars in gold. Said note is dated January 1, 1867. JOHN S. BOWKER."

After the plaintiff had closed his case, having introduced the promissory note with the necessary accompanying proof, the defendant had occasion to offer, and did offer in evidence the agreement above set out; its admission was objected to on the ground that it was not stamped as required by the act of Congress relating to the revenue laws of this state. To this objection it was answered that the two instruments constituted but one agreement or contract, and that they were executed at the same time, and consequently they were but parts of one transaction and agreement. This was sustained by the evidence of the defendant, who testified that the note and agreement were made at the same time. He testified that they were drawn up and laid on the table and signed together, and he admitted that the portion of the agreement which is the promissory note was properly stamped, sufficiently not

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s should be held to be an agreement, but even if a promissory

The court below admitted the paper and the plaintiff executed. Was the ruling correct? If the two instruments were taken together as one transaction, then upon every authority constituted but one instrument or contract, although written on different pieces of paper. They would have to be taken and construed together as if written on the same paper and signed by the parties. The law in such case deals with the matter as it was—as one transaction—and therefore all the papers drawn simultaneously bearing on the same subject are held to be but one contract, although written on several papers. If both papers constitute but one contract, then it is clear it was only necessary to have the stamps required for one contract.

There was a conflict of testimony as to whether the papers here in question were executed simultaneously, or constituted one transaction, it is true; but the court below deemed the evidence sufficient to warrant the conclusion that they should be taken as one contract, executed simultaneously, and consequently admitted the same for the purpose objected to. In such case, the conclusion attained by the court below cannot be disturbed. The decision of the court at *prior*, as to the sufficiency of proof upon any collateral matter like this, must be governed by the rule which prohibits the appellate court from setting aside a verdict or findings of fact, upon the ground of insufficiency of evidence, where there is a conflict of testimony.

As, therefore, it cannot be said the court was not warranted by the testimony in treating the two papers as one contract, evidencing one transaction, we must accept it as an established fact in this case; and as one of the papers was stamped, it must be held, as was done in the court below, that the portion of the contract which was stamped required no separate stamp for itself, and was consequently admissible.

As to the ruling upon the other assignment which is to be noticed and is likewise correct. The value of the ninety shares of Truckee Company stock could only be material, upon the assumption that the defendant was in some way bound, either to deliver the stock to the plaintiff or liable for its value. Now it is very well established that the measure of damage, in cases where there is a con-

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version of, or a failure to deliver, stock of this character accord to contract, is its market value, either at the time of conversion when it should have been delivered, or at the time of trial, according to circumstances. *O'Meara v. North American Mining Company*, 2 Nev. 123. In no case would its value, as connected with other property, or as modified by some peculiar circumstances, be a measure of damage. If the stock can be purchased in the market that which was converted, or should have been delivered, may be replaced. It is not claimed here that the particular ninety shares of stock which the defendant agreed to deliver, had any peculiar value over any other ninety shares in the same company. Why, then, should any sum be allowed as damages, beyond what may be sufficient to replace that which the defendant was called upon to deliver, or at least its market value at the time it should have been delivered? It cannot be claimed that plaintiff was damaged beyond that, and the law does not pretend to do more than award full compensation for a breach of contract. If the defendant wishes to procure the stock, he might be allowed such damages as will enable him to purchase it, and there is no claim that any equal number of shares would not be equally valuable in connection with his ranch as those which the defendant contracted to deliver. The court below ruled correctly, then, in excluding evidence of the value of the stock, *taken in connection with the ranch*. These being the only errors which can be considered upon this record, the judgment below must be affirmed. It is so ordered.

EX PARTE JAMES P. MARTIN.

STATE REVENUE STAMPS ON FOREIGN BILLS. The statute requiring the fixing of revenue stamps to foreign bills of exchange (Stats. 1871, 142) is not a regulation of commerce between this and other states, nor does it lay an impediment on exports within the meaning of Art. I, Secs. 8 and 10 of the United States constitution.

CONSTITUTIONALITY OF STATE STAMP ACT. The enactment of the statute imposing a revenue stamp upon bills of exchange drawn in this state on another state, (Stats. 1871, 142) was a legitimate exercise by the state of its inherent and unsundered power of taxation.

Ex parte James P. Martin.

HABEAS CORPUS before the Supreme Court. It appears that the petitioner in April, 1871, at the city of Virginia, drew and issued a bill of exchange for \$500, made payable at the city of San Francisco, California, without affixing a stamp thereto in accordance with the provisions of the state stamp act. Being prosecuted therefor before Wm. Livingston, a justice of the peace in Virginia City, and found guilty of misdemeanor, he was sentenced to pay a fine of \$50, in default of which payment he was imprisoned in the county jail of Storey County. It was from such imprisonment that he was taken before the Supreme Court on this writ.

Wm. S. Wood, for Petitioner.

I. By the Act of 1871, no stamp is required upon a bill of exchange drawn singly in this state, but payable at sight or on demand, in another state. The law provides that inland bills, drawn at sight or on demand, are exempt from the payment of any stamp duty, and that foreign bills, drawn singly, or otherwise than in a set of three or more, are required to pay the same duty as inland bills. Whatever, therefore, exempts an inland bill must necessarily have the same effect upon a foreign one. And as the making of an inland bill payable at sight or on demand frees it from stamp duty, a foreign bill, drawn in the same way, is free also.

II. The act is void, because in conflict with Art. I, Secs. 8 and 10, of the United States constitution. It is a regulation of commerce between this and other states and foreign countries, and it also lays an impost or duty on exports from this state and imports into the same. *Almy v. The People of the State of California*, 24 Howard, 172; *The Carson River Lumbering Company v. Patterson*, 33 Cal. 334; *Brown v. Maryland*, 12 Wheaton, 448; *Western Union Telegraph Co. v. Atlantic and Pacific States Telegraph Co.*, 5 Nevada, 107; *Gibbons v. Ogden*, 9 Wheaton, 1; *People v. Raymond*, 34 Cal. 495; *Crandall v. State of Nevada*, 6 Wallace, 35; *Sinnot v. Davenport*, 22 Howard, 227; *Ex parte Crandall*, 1 Nevada, 294.

L. A. Buckner, Attorney General, for the State.

Ex parte James P. Martin.

By the Court, GARBER, J. :

The statute under which the petitioner was convicted, (*Stats.* of 1871, 142) requires the affixing of a stamp to such a bill as that drawn by him. It levies upon foreign bills the same rate of duty imposed upon inland bills; but it does not extend to the former the exemption accorded to the latter.

The statute is not a regulation of commerce between this and other states, nor does it lay an impost or duty on exports, within the meaning of Secs. 8 and 10 of Art. I of the constitution of the United States. Though this may not have been directly decided by the Supreme Court of the United States, it follows from and is the necessary result of the reasoning of that court in *Nathan v. Louisiana*, 8 How. 73, and *Paul v. Virginia*, 8 Wallace, 168. In *Paul v. Virginia*, the proposition that foreign bills of exchange, although instruments of commerce, are the subjects of state regulation and may be subjected to direct state taxation, is assumed as the logical result of the principle enunciated in *Nathan v. Louisiana*. This assumption was not a mere *dictum*, but was virtually a decision affirming the proposition thus made the basis of the later adjudication, and to the consideration of which as "a main part of the argument," the attention of the court was pointedly directed. 5 Taunton, 159. It is also fully sustained by the argument of Chief Justice Taney, in the *Passenger* cases. He says: "I may therefore, safely assume that, according to the true construction of the constitution, the power granted to congress to regulate commerce did not in any degree abridge the power of taxation in the states. They are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So far, their taxing power over commerce is restrained but no further. They retain all the rest; and if the money demanded is a tax upon commerce or the instrument or vehicle of commerce, it furnishes no objection to it, unless it is a duty on imports or a tonnage duty, for these alone are forbidden."

A bill of exchange is neither an export nor an import, but would make no difference if it were; for the term "export,"

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the clause of the constitution referred to, embraces only articles exported to foreign countries, and does not include those exported from one state into another. 8 Wallace, 123. It follows that the enactment of the statute in question was a legitimate exercise by the state of her inherent and unsundered power of taxation. The petitioner is remanded to the custody whence he came.

MEADOW VALLEY MINING COMPANY, APPELLANT, v.
ELLIOTT DODDS *et als.*, RESPONDENTS.

TRANSFER OF CASES TO U. S. CIRCUIT COURT. Where in a suit commenced in a district court by a citizen of a foreign state against a citizen of this state, the plaintiff made an application to transfer it to the United States circuit court in accordance with the act of congress of March 2d, 1867: *Held*, that the refusal of the application was error.

JURISDICTION OF SUITS BETWEEN CITIZENS OF DIFFERENT STATES. The United States constitution (Art. III and Art. I, Secs. 8, sub. 17) vests full control and jurisdiction in the federal government over all suits "between citizens of different states"; and congress may assume jurisdiction of such cases at any stage by vesting it absolutely and exclusively in the federal courts.

TRANSFER TO FEDERAL COURT AFTER SUBMISSION TO STATE JURISDICTION. The fact that a citizen of another state has submitted to the jurisdiction of a state court a suit against a citizen of this state, does not prevent him from insisting upon a transfer of his case to the United States circuit court, in accordance with the act of congress of March 2d, 1867.

AFFIDAVIT FOR TRANSFER OF CAUSE TO UNITED STATES CIRCUIT COURT. The affidavit provided for by the act of congress of March 2d, 1867, to authorize the transfer of a case from a state court to the United States circuit court, requires a statement by the party that he has reason to, and does, believe that from prejudice or local influence he will not be able to obtain justice in the state court; but it does not require any showing of the existence of such prejudice or local influence, or any statement of facts upon which he founds his belief.

DISTINCTION BETWEEN "SHOWING" AND "STATING" A FACT. There is a material distinction between "showing" a fact and "stating" it; in the former case, satisfactory proof may be required; in the latter, the mere recital of the fact is sufficient.

APPEAL from the District Court of the Seventh Judicial District, Lincoln county.

Meadow Valley Mining Company v. Dodds.

This was an action, as originally commenced, by the Meadow Valley Mining Company, John H. Ely and W. H. Raymond against Elliott Dodds, William Dodds, Frank Dodds and Thomas Dodds to recover possession of the "Floral Spring Ranch" in Lincoln County, damages for the withholding thereof, and for rents and profits; and also for an injunction to restrain working on said ranch or removing any of the valuable waters from the springs there. A previous appeal in the same case is reported in 5 Nev. 2. After the filing of the remittitur from that appeal in the court below the action was, on motion of Ely and Raymond, dismissed as to them, leaving the Meadow Valley Mining Company, a corporation organized under the laws of the state of California, as the sole plaintiff. The defendants were citizens of this state.

Ashley & Thornton, for Appellant.

I. The court below erred in refusing to transfer the cause to United States circuit court. 1 Br. Dig. 128; U. S. Stats. at Large, 1866, Ch. 288; 1867, Ch. 196; *Gordon v. Loryist*, 16 Pet. 1; *Matthews v. Lyall*, 6 McLean, 13.

II. Raymond and Ely having been dismissed as plaintiffs, leaving the California corporation as plaintiff; and then the case could not be removed. *Connolly v. Taylor*, 2 Pet. 564. After the application made for removal, the court below should have proceeded no further.

Pitzer & Corson and *G. S. Sawyer*, for Respondents.

By the Court, LEWIS, C. J.:

The plaintiff applied for a removal of this action into the circuit court of the United States, under the act of congress of March 3d, 1867, which provides: "That where a suit is now pending in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, and the plaintiff is a citizen of another state, whether he be plaintiff or defendant, he shall make and file in such state court an affidavit stating that he has reason to, and does, believe that from prejudice or local

fluence he will not be able to obtain justice in such state court, may at any time before the final hearing or trial of the suit file a petition in such state court, for the removal of the suit into the next circuit court of the United States to be held in the district where the suit was pending, and offer good and sufficient surety for his entering in such court on the first day of its session copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as by the act to which this act is amendatory are required to be done upon the removal of a suit into the United States court; and it shall be thereupon the duty of the state court to accept the surety and proceed no further in the suit." The application in all respects conformed to the provisions of the act, but the court below refused to transfer the cause. Exception was taken to the ruling, and counsel for plaintiff refused to proceed further in the matter, whereupon judgment was rendered against it. The question is thus presented, whether the court below erred in refusing to order a transfer of the suit to the circuit court, as required by the act above quoted. To determine the question it is necessary to ascertain: first, whether the act authorizing the transfer is constitutional; and second, whether the application conformed to the requirements of the act.

Article III of the federal constitution declares that the judicial power of the United States shall extend *inter alia* to all cases between citizens of different states; and subdivision 17, Sec. 8, Art. II, confers the power upon congress to make all laws which shall be necessary and proper for carrying into effect all the powers vested by the constitution in the government of the United States, or in any department or officer thereof. Here is full control and jurisdiction vested in the federal government over all suits "between citizens of different states." The language is broad and comprehensive, extending the jurisdiction to all controversies between citizens of different states. It is given in general terms. No limitation is imposed, no exception mentioned. There being nothing in the constitution itself which restrains or limits this power, it must be maintained in the utmost latitude to which in its own nature it is susceptible.

Nor is the time when, nor the manner in which jurisdiction of

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such cases shall be assumed, in any way prescribed. To give the power full and complete effect, therefore, it must be held that congress may assume jurisdiction of the cases enumerated at any stage, by vesting it absolutely and exclusively in the federal courts. If this power be vested in the federal government by the constitution without limitation or restriction, by what process of reasoning can it be maintained that it cannot assume such control after the parties have submitted to the jurisdiction of the state courts? If the power be unrestricted, then it may be exercised at any time while it can be said that a controversy exists between parties. There is no warrant in the grant of power for restricting its exercise to cases where the person invoking the federal authority has not submitted to the jurisdiction of the state courts. To so hold, would be to circumscribe the power and limit its scope.

The power, as conferred, authorizes the assumption of jurisdiction of all cases between citizens of different states; and as the greater includes the less, it justifies the assumption of jurisdiction of such controversies, although the parties may have submitted to the jurisdiction of a state court; for notwithstanding that fact, it is still a controversy between citizens of different states, and continues so at least until the matter is determined by a judgment. We are aware that a different view was taken by a majority of the court in the case of *Whiton v. The Chicago and Northwestern Railroad Company*, 25 Wis. 424; but the reasoning by which the conclusion is attained, if none better can be adduced, is convincing evidence that the decision is erroneous. It is argued that the plaintiff, by instituting his action in the state court, waived his right to appeal to the federal courts for a decision of the matter in controversy. The process of reasoning is, first, that as he had the right to appeal either to the state or federal courts and selected the former, therefore he waived the right afterwards to have it transferred to the latter. Indeed, the whole opinion is condensed in these concluding sentences. "It seems to me, that on principle and reason it should be held that the plaintiff, by bringing his suit in the state court when he might have brought it in the federal court, has clearly waived his right to appeal to the latter tribunal, and that this waiver binds him through the litigation. As plaintiff, he has voluntarily

rily elected the jurisdiction of the state court, and there is no hardship in requiring him to abide its decision." And therefore, upon this reasoning, the court concludes that the section of the act of congress is unconstitutional. It is conceded by the court that the Act of 1789, authorizing removals on the motion of defendants, is constitutional; but a distinction is thought to exist between that and the act in question, giving the same right to plaintiffs.

This decision is certainly a curiosity in the field of logic. A more bold and palpable *non sequitur* than the conclusion drawn from the reasoning could not be imagined. It is perfectly manifest, if the act is unconstitutional, there was nothing which the plaintiff could waive; for without the act it is admitted he could not remove his action to the federal courts, and it must also be admitted that if the act be constitutional, his motion to remove should have been sustained, because the court concedes that he complied strictly with its requirements. Now then, what has the question of waiver by first bringing his action in the state court to do with the question? It is just such a case that the law of congress is intended to meet. If, therefore, the party making the application to remove, in all respects comes within the provisions and complies with the requirements of the statute, there is but one question left to be determined, and that is: Did congress have the power to pass the act? But surely, if the federal constitution confers the power on congress, the fact that a person has waived a right conferred by it in the legitimate exercise of that power cannot be claimed to be a proof that the power does not exist. That the learned judges who rendered the decision in *Whiton v. The Chicago and Northwestern Railroad Company* fell into error, seems to us too clear to admit of doubt.

Upon the second question in this case but little need be said. It is admitted the affidavit is sufficient in all respects, except that it does not set out the facts upon which the appellant bases his belief that such local prejudice existed that he could not obtain justice. It will be observed that the statute only requires the person moving to have the case transferred to make and file an affidavit stating that he has reason to, and does, believe that from prejudice or local influence he will not be able to obtain justice in such state court. The statute specifies what the affidavit shall contain. It does not

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require the existence of local prejudice, or the fact that justice cannot be obtained in consequence thereof, to be *shown* or proven to the satisfaction of the court to whom the application is made. If the act required that fact to be *shown*, then, in conformity to decisions upon like statutes, it would be necessary to state the facts upon which the applicant founded his belief. But here the statute only requires the person making the affidavit to *state* the fact. There is an obvious and material distinction between *showing* a fact and stating it. In the one case, satisfactory proof may be required; in the other, the mere recital of the fact is sufficient. The affidavit in this case does state the fact, that from local prejudice the affiant cannot obtain justice, and thus it comes strictly within the letter of the statute.

The court below erred in denying the motion. Its judgment must therefore be reversed.

GARBER, J., did not participate in the foregoing decision, having been of counsel.

THE STATE OF NEVADA, RESPONDENT, v. AH TONG,
APPELLANT.

CRIMINAL CHARGE—USE OF WORDS "VINDICATE THE LAW." Where, in a murder case, the judge, after giving the statutory definition of the crime, used the following language: "Such is the law which you as jurors are called upon to vindicate," &c.; *Held*, that, though the instruction might have been only meant to enjoin the jury to assert and maintain the law, it would have been better to have told the jury so, and still better to have omitted that portion of the charge altogether.

CHARGE THAT VERDICT EITHER WAY WILL BE CORRECT. Where, in a murder case, the judge charged the jury, "Do simply that duty which naturally presents itself as you act under your oath and the law and the testimony before you; and you cannot greatly err, whatever may be your verdict": *Held*, that this amounted to telling the jury that whether they convicted or acquitted, their verdict would be substantially correct; and was fatal error.

CHARGE THAT APPROXIMATION TO TRUTH IS SUFFICIENT. An instruction in a criminal case that an approximation to the truth by the jury would be all sufficient, and that their duty would be fulfilled by the avoidance of any very wide departure from a correct verdict, is objectionable.

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DO NOT INTIMATE JUDGE'S OPINION ON FACTS. A judge in a criminal case has no right to intimate an opinion upon the facts either directly or by innuendo; and the effect of such an opinion expressed or indicated cannot be obviated by announcing the jury's independence of him in all matters of fact.

RIGHTS OF ACCUSED TO JURY'S DELIBERATE ATTENTION. A defendant in a criminal case has the right to the deliberate, independent, voluntary and unbiased judgment of the jury upon the truth of his theory or hypothesis of the case, without having the force of his position weakened by an instruction or intimation that even if they convict him they will not greatly err.

APPEAL from the District Court of the Second Judicial District, Esmeralda County.

The defendant was convicted of the murder in the first degree of Ah Wy, committed by shooting with a pistol on May 11th, 1871, Carson City. He was sentenced to be hanged.

T. W. Coffroth, Clayton & Davis, and Thomas Wells, for appellant.

The word "vindicate," as used in the charge, means to punish an infraction of the law. It assumes that the law has been broken, that a crime has been committed; and the instruction puts out the defendant as the party charged with its commission. It leaves no chance for his escape, except the question of fact, whether he did the act of killing. This is not the law. Defendant is entitled to have *all questions of fact* fairly submitted to the jury. See *People v. Corabin*, 14 Cal. 438; *People v. Ah Fung*, 16 Cal. 430; *People v. Jenkins*, 16 Cal. 431; *People v. Williams*, 17 Cal. 143; *State of Nevada v. Duffy*, 6 Nev. 138; *People v. Murray*, 17 Cal. 158; *People v. Maxwell*, 24 Cal. 14; *People v. Campbell*, 30 Cal. 312.

Robt. M. Clarke, for Respondent.

The instructions must be considered as an entirety, and so considered correctly give the law. Hilliard, 215, Section 23; 8 Cal.

There was no assumption of fact in the instructions. Nothing was said which could prejudice the jury against the defendant. If the expressions assigned as error should prevail, we shall next hear arguments assigned as error that the judge frowned or smiled during the trial,

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and that from these expressions of countenance the defendant was injured. Wharton C. L., Section 3081; 11 Wend. 18; 1 Denio, 282; 10 Pick. 252; 15 Pick. 321; 4 Rem. 517; 2 Ames R. L. 245.

L. A. Buckner, Attorney General, *T. D. Edwards* and *Wm. Patterson*, also for Respondent.

By the Court, GARBER, J. :

The appellant was convicted upon conflicting and partially circumstantial evidence, of the crime of murder in the first degree. The court, in charging the jury, after giving the statutory definition of the crime, used the following language: "Such is the law which you, as jurors, are called upon to vindicate, and such is the charge against the defendant, who looks to you for the benefit of any reasonable doubt. * * Do simply that duty which naturally presents itself, as you act under your oath and the law and the testimony before you, and you cannot greatly err, whatever may be your verdict."

The word "vindicate," it is argued, means to "punish for an infraction of," and consequently, it is said, the charge assumes that the law has been broken: on the other hand, it is contended that the instruction only enjoins the jury to assert and maintain the law. Admitting that the latter is the proper construction, it would have been much better to have told the jury so, in language plain and unambiguous, and it would have been still better to have omitted altogether this portion of the charge. It was error, to tell the jury that whether they convicted or acquitted, their verdict would be substantially correct.

We agree that the whole charge must be fairly construed, as entirety; but, with the aid of the context, it is not easy to say exactly what idea was intended to be conveyed by this particular sentence. Probably, it was intended to guard against a misapprehension in regard to the quantity of proof necessary to a conviction. It has been laid down that "the doubt which entitles to an acquittal must be real, not captious or imaginary. It must not be forced or artificial doubt; manufactured, so to speak, by the sy-

pathy of the jury. But it must be a doubt which, without being sought after, fairly and naturally arises in the mind, after comparing the whole evidence and deliberately considering the whole case. If, upon such comparison and consideration, the mind and consciences of the jurors are not abidingly and firmly satisfied of the defendant's guilt; if moral certainty is not produced; if the judgment wavers and oscillates; the charities of the law and the presumption of innocence concur in requiring the jury to give the accused the benefit of the doubt thus arising, and to acquit him." 18 Iowa, 459. If this entire quotation had been given in charge to the jury, they could not, perhaps, have been misled by its use of the word "naturally," though we decidedly prefer the definition of a reasonable doubt, as given by Chief Justice Shaw. But, as the word here occurs, it may well have weakened the impression of the solemnity of the occasion elsewhere attempted to be made. One whose life is thus put in jeopardy, has a right to expect something more from his triers than the listless performance of that duty which, spontaneously, and without effort on their part, suggests itself. He is entitled to the most conscientious, elaborate and painstaking exercise of their highest faculties—of all their powers of memory, reason, discrimination and judgment. An intimation that, whatever may be their verdict, they cannot greatly err, may be caught at as an invitation or a license to shirk an irksome duty, and to substitute, for deliberate and well grounded convictions, "the impulses of sudden conclusions and slight suspicions." If it was necessary to define the duty of the jury, it was of the utmost importance that the definition should be clear, precise and correct. Due care and caution is a relative term. That only is such, the degree whereof corresponds with the nature of the duty to be performed, and rises to the exigency of the occasion. It would hardly be proper, in defining the duty of a common carrier of passengers, to tell the jury that the engineer of a locomotive or the conductor of a train need simply do that which naturally occurs to him, and that, if he so conducted, in view of his responsibilities, he could not have greatly erred. The law is that, with the lives of others depending upon his skill and faithfulness, he must do all that human care and foresight can suggest.

It has been held erroneous to instruct that jurors are not to disbelieve as jurors, while they believe as men ; or, to act upon the evidence as they would act upon in matters of high importance to themselves, will exclude a reasonable doubt. 20 Iowa, 96; (Law) 307; 2 Met. (Ky.) 30. Such instructions ignore the magnitude of the risk incurred by hasty or inconsiderate action on the part of a juror, as compared with that ordinarily attending the decisions of men in the every day transactions of life. This instruction is still worse. It broadly hints that an approximation to the truth would be all-sufficient, and that the duty of the jury would be discharged by the avoidance of any very wide departure from a correct verdict. If any error of the jury in a capital case can be of great moment, here was surely no place for the application of the maxim *in minimis non curat lex*.

Under our practice, the judge should intimate no opinion as to the facts. "If he cannot do so directly, he cannot indirectly; explicitly, he cannot by innuendo; and the effect of such an instruction cannot be obviated by announcing in distinct terms the jury's independence of him in all matters of fact." 2 Winston, 47. The subject is stated to be, to guard against the well known propensity of jurors to seek to ascertain the opinion of the judge, and to shift their responsibilities from themselves to the court. 3 Jones, 6. The dissenting opinion of the present chief justice of this court in *State v. Millain*, expresses fully what we consider the law on this subject. It is also settled that any instruction, from which inferences plainly prejudicial to the defendant can be drawn, is erroneous. Of course, we intimate no opinion as to the sufficiency of the evidence. We think it was sufficient in law. The defendant had the right to attempt to convince the jury that, under the circumstances, a conviction would be palpably against the law and fair construction of the evidence, and would work a flagrant injustice; or he may have contended that the case was difficult and complicated, demanding the nicest discrimination and the closest attention; that at first blush, and upon a superficial examination, the testimony was suggestive of erroneous conclusions; but that a full investigation and thorough understanding of it would insure an acquittal. Upon the truth of his theory or hypothesis, he was entitled

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deliberate, independent, voluntary and unbiased judgment of the jury, without having the force of the position weakened by an instruction or intimation that, even if they convicted him, they would not greatly err, or that there was so little of intricacy or difficulty in the case that a simple performance of their obvious duty, without any great care or forethought, would suffice; or that the case was not a clear one, but was so evenly balanced on the proofs as to justify a verdict either way; or that any verdict thus arrived at would meet the approval of the court, and should exonerate them from all censure or regret.

The judgment is reversed, and the cause remanded for a new trial.

THE STATE OF NEVADA, RESPONDENT, v. TIM O'FLAHERTY, APPELLANT.

AFFIDAVIT FOR CONTINUANCE—MATERIAL FACTS TO BE STATED POSITIVELY. Where on motion for continuance in a criminal case, on account of absence of a material witness, defendant made an affidavit to the effect, among other things, that a subpoena had been issued in due time for him and placed in the sheriff's hands; that the sheriff had returned it "not found in the county"; that the witness resided at a certain place in the county; and that affiant was informed by his counsel and believed that the sheriff had been at the time told the place of such residence: *Held*, that the fact of the sheriff having been so informed should have been shown positively, and not upon mere information and belief; and that, in the absence of such positive statement, and no good reason shown why the affidavit of the attorney or sheriff could not be procured, a refusal of the motion was no error.

PRACTICE ON REFUSAL OF CONTINUANCE. Where a continuance on account of the absence of a witness is refused, the safer practice is to embody all the testimony in a bill of exceptions; and on motion for a new trial to file the affidavit of the witness, if procurable, setting forth the facts within his knowledge.

FORM OF INDICTMENT—LEGISLATIVE POWER. The power of the legislature to mold and fashion the form of an indictment is plenary; its substance, however, cannot be dispensed with.

CONSTITUTIONAL RIGHT OF ACCUSED TO PROPER INDICTMENT. A defendant in a criminal action is entitled under the constitution to have the essential and material facts charged against him found by a grand jury.

ASSAULT WITH INTENT TO MURDER—SUFFICIENCY OF INDICTMENT. Where an indictment charged that on a certain day, defendant, without authority of law

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and with malice aforethought, did shoot at one James Norton with a pistol loaded with powder and leaden bullets with intent to kill him, &c.: *Held*, that the technical word "assault" should have been employed, and an intent murder stated; but the statutory form of indictment having been followed and no objection before judgment made, the indictment should be held sufficient.

INDICTMENT CHARGING "SHOOTING AT" PERSON WITH LOADED PISTOL. The words "shoot at" in an indictment imply that the person shot at was within range and distance; and where such "shooting at" a person with loaded pistol with intent to kill him is charged, it is permissible and necessary to prove the preparation and efficiency of the weapon, and other circumstances evidencing the ability of defendant.

INFORMAL ALLEGATION OF INTENT TO MURDER. An allegation in an indictment that a shooting at another person with a loaded pistol was "without authority of law and with malice aforethought, and with intent to kill him," is sufficient as an allegation of an intent to murder.

DEFECTS OF FORM IN INDICTMENT—OBJECTIONS TO BE MADE BELOW. Objections to the form of an indictment for defects apparent upon its face cannot be taken advantage of for the first time on appeal.

APPEAL from the District Court of the Ninth Judicial District, Elko County.

The defendant having been convicted of an assault with intent to murder, as stated in the opinion, was sentenced to imprisonment in the state prison for the term of fourteen years.

T. D. Edwards, for Appellant.

I. If a defendant in a criminal case, when called for trial, finds himself unprepared, courts should be and usually are extremely indulgent in granting adjournments, even where it is simply expedient that a continuance should be had. 3 *Graham & Waterman* on N. T. 894; *Turner v. Morrison*, 11 Cal. 22; 28 Cal. 44; 6 Cow. 578; 7 Cow. 399; 9 Geo. 373; 5 Ind. 533; 6 We. 603; 6 Cal. 250.

II. The court's discretion is to be used within well established legal rules. It is a sound and equitable and not an arbitrary discretion, which the court is required to exercise. 3 *Graham & Waterman* on N. T. 1001; *Hook v. Marmy*, 4 Hen. & Mun. 14; Note; *Jacob v. Sale*, Gilmer, 123; 1 Black. 50.

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T. W. W. Davies, also for Appellant, on rehearing.

I. The facts stated do not constitute a public offense, as no crime is charged known to the criminal laws of this state. Our statute has not repealed the common law in its technicality in charging the intent in determining the degree of guilt; but, if at all, only in the description of the offense, and acts that constitute it.

II. The statutory form of indictment for assault with intent to murder is not only defective for uncertainty, but utterly insufficient in the light of all well established precedents. Under the constitution of this state and of the United States, the legislature had no power to prescribe any such form. Const. of Nev., Art. VIII, Sec. 8; U. S. Const., Amendment V; 3 Nev. 416; 2 Parker's Crim. Rep. 700; 513.

III. The offense sought to be charged is not set forth with the requisite directness and certainty to constitute an "assault"; there must be an unlawful attempt, coupled with present ability to commit a violent injury upon the person of another. One of the facts necessary to show a present ability is not contained in the indictment, to wit: that the defendant was within shooting distance at the time he is charged with discharging the pistol. (Stats. 1861-64, Sec. 46.) *People v. Yslas*, 27 Cal. 630.

L. A. Buckner, Attorney General, for Respondent.

By the Court, GARBER, J.:

The appellant was convicted of an assault with intent to murder. He assigns for error the refusal of the court to grant him a continuance, for which he applied upon an affidavit, in which he deposed that one John Bradley was a necessary witness for him; that on the twenty-first day of November, 1870, the cause was set for trial on the first of December, 1870; that on the twenty-second of November, he procured from the clerk a subpoena for said witness, and on the same day placed said subpoena in the hands of the sheriff for service; that the sheriff, as affiant is informed by his counsel, F. M. Smith, and believes the same to be true, placed said subpoena in the hands of L. Jackson, deputy sheriff, for service;

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that said sheriff has returned said subpoena with the following endorsement thereon: "The within named John Bradley not within this county"; that said Bradley resides at Cope Mining tract, in this county, and that said sheriff, as affiant is informed by his said counsel and believes true, was so informed at the time said subpoena was placed in his hands; that said witness' attendance upon this court at the next term thereof can be procured; and that this affidavit is not made for delay, but that justice may be done. The affidavit also set forth the facts expected to be proved by said witness, and that affiant knew of no other witness by whom said facts could be proved. These facts were pertinent and material to the issue joined.

It was necessary to state in the affidavit, the fact that said sheriff was informed of the whereabouts of the witness; and under the circumstances, we think it was equally necessary that the facts should have been positively averred, and not merely upon information and belief. If there existed any good reason why the attendance of the sheriff or the attorney could not be procured, such reason should have been made to appear. There would be more danger in granting continuances upon the unsworn statement of the attorney, made in open court, than in granting them, if the witness is within call, upon the oath of the defendant, that his attorney made such statement to him out of the court. 1 Hempstead 2 Blackford, 286; 24 Cal. 37; 38 Cal. 188. Other facts are also stated upon information and belief only. The proper practice, where a continuance is refused, is to embody all testimony in the bill of exceptions, and on moving for a new trial to file the affidavit of the witness, if procurable, setting forth the facts within his knowledge and to which he would have testified. Smedes & M. 401. The judgment is affirmed.

A rehearing having been granted, the following opinion was rendered at the January term, 1872:

By the Court, GARBER, J.:

On the first hearing of this appeal, the only assignment of error related to the action of the court below in refusing a continu-

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A petition for a rehearing was filed, in which, for the first time, the position was taken that the indictment is fatally defective, in that it fails to show a present ability on the part of the defendant to consummate the intention alleged, either by using the technical word "assault," or by stating, in other terms, facts showing the existence of such ability; and in that it fails to charge an intent to commit murder. In order that the question of the sufficiency of the indictment might be argued, a rehearing was granted. The indictment accuses the defendant of a felony, committed as follows: "That the said Tim. O'Flaherty, on the 15th day of June, A. D. 1870, in the county of Elko, state of Nevada, without authority of law and with malice aforethought, did shoot at one James Norton with a pistol, loaded with powder and leaden bullets, with intent to kill him, the said James Norton, contrary," etc.

The attorney general contends that the indictment is in the form prescribed by the Statute of 1867, and must therefore be sustained. It is true, the indictment is in the exact form prescribed. But the question remains, whether it is materially and substantially defective.

The power of the legislature to mold and fashion the form of an indictment is plenary. Its substance, however, cannot be dispensed with. Upon the same principle, it is held, that a statute which destroys or materially impairs the right of trial by jury, as it existed according to the course of the common law, is repugnant to the constitutional guarantee of that right.

Then, what are the substantial, essential and material facts, to the finding of which, by the grand jury, the constitution entitled the defendant, and which, it is claimed, are not found by this indictment? They are, that the defendant, having the ability and intent, unlawfully, and with malice aforethought, to kill James Norton, did attempt so to murder the said Norton. It may be conceded that these facts are not alleged artistically, and with technical precision—to this end, the appropriate word "assault" should have been employed, and an intent to murder should have been stated. But that is not the question here. It is sufficient, no objection having been made before judgment, and the statutory form having been followed, that the requisite facts can be implied from the allegations on the record, by fair and reasonable intendment; and that the is-

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sue joined was such as necessarily required on the trial proof of such facts. Thus tested, the indictment is good. The words "shoot at" had, before the statute prescribed this form, acquired a definite meaning in law, and had been held to imply that the person shot at was within range and distance. And, under indictments charging a shooting at another with a loaded pistol, or the like, it was always both permissible and necessary to prove the preparation and efficiency of the weapon, and other circumstances evidencing the ability of the defendant to do the mischief intended.

It is also substantially alleged, that the mischief here intended was to murder Norton. The words "without authority of law and with malice aforethought" applied to the shooting, extend on and qualify the intent alleged, and so equally refer to the subsequent word "to kill." *Heydon's Case*, 4 Co. 41, a.

It may be that, but for the statute prescribing this form, this indictment would be held ill on demurrer. But even without the aid of that statute, the indictment should be upheld against the objections here urged, on the ground that it is defective, if at all, in form rather than in substance; and that, consequently, though we construe Sections 286, 294, 430 and 472 of our Criminal Practice Act with the utmost possible strictness against the state, such defects when apparent on the face of the indictment, cannot be taken advantage of for the first time on appeal. The objection may be waived by a failure to take it when and as the statute reasonably requires. It is contended for the state, that not even the objection that the facts stated do not constitute a public offense can be taken for the first time taken on appeal; but we need not pass upon the point in this case. The judgment is affirmed.

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CHARLES LAMBERT *et al.*, RESPONDENTS, v. SAMUEL McFARLAND *et als.*, APPELLANTS.

WRITTEN FINDINGS BY JURY TO BE PROPERLY ASKED FOR. If a party desires a written finding by a jury upon particular questions of fact, he should before the jury retires request the court to instruct them to bring in a written finding upon such questions; and, if not so asked, it is no error, after the jury has brought in a general verdict, to refuse to send them back to find specific answers to special interrogatories.

OBJECTION TO SPECIAL FINDINGS BY JURY. Where special findings are asked for in due time the court should, if they are properly framed, always submit them to the jury.

REQUISITES OF AFFIDAVIT TO TAKE DEPOSITIONS. The affidavit required to be made to authorize the taking of the deposition of a witness within the state, has to show that the case is one of those mentioned in the statute, Practice Act, Sec. 407; but need not show that the summons has been served.

APPEAL from the District Court of the Third Judicial District, Washoe County.

This action was commenced by Charles Lambert, H. J. Mason and M. L. Yager, against Samuel McFarland, W. W. Savery, John Rothenbuchen, A. Cornwall and J. Roth, partners under the firm name of W. W. Savery & Co., to recover \$823.41 and interest on a promissory note, dated June 1st, 1868, signed "W. W. Savery & Co., per Savery," and \$72.36 for goods sold and delivered in the same month. Defendant McFarland filed a separate answer, setting up that defendants were partners only in working and developing a mine in Lincoln County, and not otherwise; that the note was made by Savery alone and not by the partnership; that Savery had no authority to execute a note for such partnership; and that as to goods sold and delivered, he had no knowledge sufficient to form a belief, and therefore denied such sale or delivery. Defendants Rothenbuchen, Cornwall and Roth also filed an answer, substantially to the same effect as to the note, but without special reference to the goods alleged to have been sold and delivered.

On the trial of the cause, the judge in his charge to the jury instructed them to determine from the evidence the facts, and from

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them to find a general verdict; and that their first duty was to determine from the evidence, among other facts, whether or not the defendants were a copartnership; whether or not they composed strictly mining partnership; whether or not they composed a general copartnership; whether or not defendants held themselves out to plaintiffs and so dealt with them in the course of business transactions as to induce a credit in their favor as a general copartnership on the part of plaintiffs; whether or not the maker of the note had authority from defendants to execute it and make it binding on them as a firm; and whether or not the account was proven and properly chargeable against defendants as a firm.

The jury returned a written verdict that they found a general verdict for plaintiffs, which they signed, and after their signature the writing continued as follows: "We find on special interrogatories as follows, to wit: 1st, The precise time when the general partnership commenced is rather difficult to determine; the evidence is not altogether clear, but it is evident to the minds of the jury that such a copartnership was created or raised by the operation of the law some time between the month of April, 1867, and before the close of January, 1868, and the precise time could not be fixed if it could be determined when they first held themselves out in the ordinary course of business as copartners, and obtained credit as such; and we further find that on the twenty-fourth day of January, 1868, the partnership consisted of five persons to wit: W. W. Savery, Samuel McFarland, A. Cornwall, Rothenbuchen and J. Roth. 2d. We find that the defendants prosecuted the work under the lease as a mining and smelting company, and for the purpose of making money rather than developing the mine. 3d. We find the handwriting of the promissory note to be that of W. W. Savery. 4th. We find that the defendants never authorized specially any one to sign any obligation; but under the operation of law, all or any one were empowered to do so."

Before the reading and recording of the verdict, counsel for the defendants moved the court to instruct the jury to retire and answer to the interrogatories submitted, which motion was denied.

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and defendants excepted. Defendants then moved for judgment on the special verdict, which was denied and exception taken.

It appears from the record in the case, that just previous to the reading of the charge the defendants asked the court to submit to the jury certain interrogatories, with instructions to find special answers to each, which motion was granted; but there is nothing in the record to show what such interrogatories were, or whether they differed from the questions propounded by the judge; nor is there anything to show that written answers were asked for.

In the course of the trial, the plaintiff offered the depositions of J. W. Savery and M. L. Yager. Defendants objected to them, on the ground that the affidavit upon which they were taken was insufficient in not affirmatively showing that the summons had been served, or that defendants had appeared in the action. The objection was overruled and defendants excepted. It appeared that the affidavit was made by A. J. Mason, and set forth that he was one of the plaintiffs; that plaintiffs were desirous of having the testimony of the witnesses, Savery and Yager, on the trial, who were not residents of Washoe County, but were residents of White Pine County, and that plaintiffs would take their depositions.

Mitchell & Stone, for Appellants.

I. A mining copartnership only, is alleged in the answer to have existed. A member of such partnership cannot, unless specifically authorized, bind the company, or its individual members, by a promissory note or contract of indebtedness executed in the name of the company; and it is incumbent on the party claiming to hold the company for such indebtedness, to show the authority under which it was contracted. *Skillman v. Lachman*, 23 Cal. 198; 30 Cal. 300; 28 Cal. 569.

II. There was error in admitting the depositions of Savery and Yager. Depositions can only be taken, under our statute, where a summons has been served or defendant has appeared. The affidavit upon which the deposition is taken should affirmatively show that it is a case within the statute. (Stats. 1869, 258, Sec. 407.)

III. There was error in refusing to require the jury to return

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and answer the interrogatories submitted to them. (Stats. 1869, 223, Sec. 176); *Breeze v. Doyle*, 19 Cal. 101; *Knickerbocker v. Nevada S. M. Co. v. Hall*, 3 Cal. 194.

Ellis & King, for Respondents.

I. We think all the requisites of the statute in respect to the taking of depositions within the state were shown to have been complied with in the depositions of Savery and Yager, and they were properly admitted. The record shows that the summons had been properly served.

II. The central question of the case, as to whether defendants were solely and strictly a mining copartnership, or whether they were trading or commercial one, being a mixed question of law and fact was properly submitted to the jury; and the evidence being at least conflicting, as against the position of defendants, this court will not disturb the verdict. *Rice v. Cunningham*, 29 Cal. 492; *Carly v. Lannan*, 4 Nev. 156; *Reed v. Reed*, 4 Nev. 395.

By the Court, GARBER, J.:

There was no error in refusing to send the jury back with directions to find more specific answers to special interrogatories. If the appellants desired a written finding upon particular questions of fact, they should have requested the court to instruct the jury to bring in a written finding upon such questions, and such instruction should be asked for before the jury retired. The record does not show that the court, of its own motion, so instructed. The instruction was to find a general verdict, and the particular questions of fact were alluded to as necessary to be first determined, in order to arrive at the proper general verdict. Where special findings are asked for in due time, the court should, if they are properly framed, always submit them to the jury. In this way, the expense and delay of a second trial may often be avoided, and by this practice the law is much more effectually separated from the fact, than by giving hypothetical instructions.

The depositions were properly admitted. It is not necessary to state in the affidavit that service of summons has been had. This

fact can be as well, or better, known by an inspection of the record ; and a fair construction of the language of the statute shows that it was not intended to require it to be set forth in the affidavit. Four cases are mentioned in which testimony may be taken by deposition. Even in those cases, it is true, the deposition cannot be taken prior to service of summons, etc. But the statute only requires the affidavit to show that the case is one of those mentioned—not that the action has progressed to that stage in which a deposition may be taken in the cases mentioned.

The other assignments depend upon the alleged insufficiency of the evidence. We cannot consider them, in the absence of any showing that all the testimony is before us. The judgment and order appealed from are affirmed.

**ARTHUR McNABB, APPELLANT, v. W. W. WIXOM *et als.*,
RESPONDENTS.**

DUTIES OF ADMINISTRATORS—CARE AND DILIGENCE. Whenever an administrator does what the law prohibits, or fails to exercise reasonable care and diligence in the endeavor to do what the law enjoins, he and his sureties are liable for the damage consequent upon such act or omission.

NEGLECT BY ADMINISTRATOR TO PAY OVER—LIABILITY FOR SUBSEQUENT LOSS.

If an administrator deposits money of an estate in a bank, and allows it to remain after the time when, if he had fulfilled his duty, it would have been distributed and in the hands of those entitled to it ; and the bank fails and the money is lost, he and his sureties are liable therefor.

MEASURE OF DAMAGES FOR LOSS BY NEGLIGENCE OF ADMINISTRATOR. Where money of an estate is lost by reason of such neglect of an administrator as he and his sureties are liable for, the sum lost constitutes the measure of damages.

TIME WITHIN WHICH ADMINISTRATORS TO ACCOUNT AND SETTLE. Where a complaint against an administrator to recover money lost by his alleged neglect set out that it was his duty to render his account and settle and distribute on the expiration of a year from his appointment ; that he was required by the demands of the heir to do so, but refused ; and that seven months after the expiration of the year, the bank in which the money of the estate was deposited failed and the money was lost ; *Held*, that it did not follow from the allegations that it was the administrator's duty to file his final account on the expiration of the year, or to have completed the distribution of the estate prior to the breaking of the bank.

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INVENTORY NOT CONCLUSIVE EVIDENCE. An inventory filed by an administrator is not conclusive evidence either for or against him or his sureties, but is open to denial or explanation.

ADMINISTRATOR BOUND BY DECREE OF SETTLEMENT. A decree of settlement and distribution by a probate court is binding upon the administrator.

ARE ADMINISTRATORS' SURETIES BOUND BY DECREE OF SETTLEMENT? Whether or not a decree of settlement and distribution is conclusive or even prima facie evidence of anything more than the fact of its rendition; it is to be observed that the bond required by our statute differs from that in use in states where such sureties are held bound.

NEGLECT OF ADMINISTRATOR TO ACCOUNT—DEMAND AND REFUSAL NOT NECESSARILY CONVERSION. Where in a suit against an administrator and his sureties for moneys alleged to have been lost by failure and refusal of the administrator to file his final account and distribute the estate nineteen months after his appointment: *Held*, that the mere failure on the part of the defendants to deny the demand and refusal did not admit the conversion alleged.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

The defendant, Wixom, was public administrator of Lander County; the other defendants, sureties on his official bond, were A. Haas, M. A. Sawtelle and Mark McKimmins. The complaint was very full, and among other things set out the inventory, the final account and its settlement, and the decree of distribution, also demand for the amount found due on settlement and order to be distributed, refusal to pay the same, and its conversion by the administrator.

The final account and report was as follows:

" APPRAISED VALUE OF ESTATE.		
" One cream-colored horse, currency		\$75.00
One grey horse, "		75.00
100 shares of vineyard stock, "		200.00
Colt's revolver, "		25.00
Saddle, "		15.00
Coin		1400.00
Currency		175.00
		<hr/>
		\$1,965.00

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“ In coin	\$1,400
In currency	565 •
<hr/>	
Total	\$1,965

“ Of the above property there has been sold, the cream-colored horse, for currency \$75.00
The grey horse, “ 36.00

“ The saddle, revolver, and vineyard stock still remain unsold and in my possession.

“ There came into my hands, from the estate of said deceased, two certificates of deposit in the First National Bank of Nevada, one dated June 19th, 1866, for \$175, currency, and the other dated June 17th, 1867, for \$1,400, coin, in favor of said Robert McNabb. I presented the certificates at said bank, and had the deposits above named placed to my credit as administrator of said estate, receiving, at the time, from the cashier of said bank, a receipt therefor. On or about the — day of October, A. D. 1869, and whilst the whole of said money was still on deposit as aforesaid, the said First National Bank of Nevada failed, and the said deposits have been lost, except in so far as the said bank, upon the final settlement of its affairs, may be able to meet its liabilities.

“ MONEY DISBURSED, COIN : G. A. Davis, auctioneer, \$10 ; appraisers, \$15 ; clerks' fees, \$20 ; printing, \$10 ; ranching and feeding horses, \$57.25 ; F. Wheeler's board bill, \$70 ; fees, \$81.68 ; Jos. F. Triplett, \$50 ; attorneys' fees, T. Wren, \$100 ; Total, \$413.93.”

The said account was verified by the oath of defendant Wixom, and filed June 14th, 1870.

On August 4th, 1870, the court below confirmed, allowed and settled said account, and rendered its judgment and decree, allowing, confirming and settling said account and report.

On August 6th, 1870, the plaintiff filed a petition for an order of distribution of the estate, and that all the property and funds belonging to the estate might be given to him.

On September 10th, 1870, the following decree of distribution was made and entered :

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"In the District Court of the County of Lander, State of Nevada":

"In the Matter of the Estate of } Decree of Distribution of Estate.
Robert McNabb, deceased."

"Arthur McNabb, brother and sole heir of Robert McNabb, deceased, having on the sixth day of August, A. D. 1870, filed in this court his petition, setting forth among other matters that the accounts have been finally settled; that all the debts of said deceased and of said estate, and the expenses and charges of administration, have been paid; that a portion of said estate remains to be divided among the heirs of said deceased, and praying for an order of distribution of the residue of said estate among the persons entitled.

"And this court having thereupon, to wit: on the day aforesaid, made an order directing all persons interested in said estate to be and appear before this court at the court room thereof, on Saturday the tenth day of September, A. D. 1870, at 10 o'clock A. M., then and there to show cause why an order of distribution should not be made of the residue of said estate among the heirs of said deceased, according to law, and directing a copy of said order to show cause to be published for four successive weeks before said tenth day of September, A. D. 1870, in the "Reese River Reveille," a newspaper printed and published in the said county of Lander. And at said hour and on said tenth day of September, A. D. 1870, upon satisfactory proof of the due publication in said newspaper of said order to show cause, for four successive weeks before said tenth day of September, A. D. 1870, as directed by this court, and upon proof that a copy of said order was served on W. W. Wixom, the public administrator of said county and administrator of said estate, on the eighth day of August, 1870, in said county of Lander, and the said Arthur McNabb appearing by his counsel, H. Mayenbaum, this court proceeded to the hearing of said petition; and the inventory and appraisement of said estate, the final account of said W. W. Wixom, administrator, the decree allowing and settling the same, and the decree of publication of notice to creditors, together with other documentary and record proofs, were offered and put in evidence; and D. McKenney was examined under oath in open court, and it app

ing to the satisfaction of this court, from said documentary and other proofs and said examination of said D. C. McKenney, that said W. W. Wixom duly qualified as such administrator of said estate on the sixteenth day of March, A. D. 1868, and thereupon entered upon the administration of said estate, and has ever since continued to administer the same; that due and legal notice to creditors was published, and that a true inventory and appraisement of said estate were duly made and returned to this court; that more than two years have elapsed since the appointment of said W. W. Wixom as such administrator, and more than ten months have expired since the first publication of said notice to creditors; that on the fourteenth day of June, A. D. 1870, said administrator filed his final accounts; and that after due hearing and examination the same were finally settled; that the said administrator has fully accounted for all the estate that has come to his hands, and that the whole estate, so far as has been discovered, has been fully administered, and the residue thereof, consisting of the property described in said final account, is now ready for distribution; that all the debts of the said deceased and of said estate, and all the expenses of the administration thereof thus far incurred, and all taxes that have attached to or accrued against the said estate have been paid and discharged, and said estate is now in a condition to be closed.

“That the residue of said estate is the property described in said final account after deducting the moneys disbursed by said administrator as set forth on page 3d of said final account; that the said Robert McNabb died intestate, in the said county of Lander on the third day of October, A. D. 1867, leaving a surviving brother and sole heir, the said Arthur McNabb; that the said Arthur McNabb is entitled to the whole of the residue of said estate.

“Now on this, the tenth day of September, A. D. 1870, on motion of H. Mayenbaum, Esq., counsel for said Arthur McNabb, no exceptions or objections being filed or made by any person interested in the said estate, or otherwise; it is hereby ordered, adjudged and decreed, that the said residue of said estate of Robert McNabb, deceased, now remaining in the hands of the said W. W. Wixom, and any other property not now known or discovered, which may

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belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to wit the whole of the said residue of said estate to be given and delivered by said W. W. Wixom to said Arthur McNabb. And it is further ordered: that the said W. W. Wixom, administrator, upon payment and delivery of the said residue as hereinbefore ordered and upon filing due and proper vouchers and receipts therefor to this court, be fully and finally discharged from his trust as such administrator, and that his sureties shall thereupon and thenceforward be discharged from all liability for his future acts.

JOHN H. BOALT, District Judge."

H. Mayenbaum, for Appellant.

I. The answer does not deny a single material allegation in the complaint, or set up new matter. Such an answer should be stricken out, and the plaintiff have judgment upon the facts stated in his complaint. Practice Act, Sec. 50; *Curtiss v. Richards*, 9 Cal. 33; *Gay v. Winter*, 34 Cal. 153; *People v. McCumb*, 18 N. Y. 315; *Hill v. Sherwood*, 33 Cal. 478.

II. The complaint sets out the final account filed by Wixom as such administrator, and the decree of distribution. The denial that he has in his hands any money amounts to nothing, for the facts showing that he had the money in his hands are not denied. Besides, it may be true that the administrator has not the money in his hands, and still be responsible for it. If there be any claims paid, why are they not set out in the answer? The allegations in the complaint taken as true, because not denied, necessarily make the administrator liable.

The next denial to the answer is: "Defendants deny that said W. W. Wixom ever converted to his own use any money or property belonging to said estate, with the intent to defraud said plaintiff thereof, or with any intent or at all."

This denial is as frivolous and immaterial as the other denials.

III. The denial of any conversion is frivolous and immaterial. The complaint shows that plaintiff often demanded of the administrator

trator to pay over the residue of the estate, and that he refused. This constitutes a conversion.

The law requires accounting and settlement of the estate on the expiration of one year from the time of the appointment of the administrator. Section 230 of our Probate Act.

IV. Wixom is responsible for the full amount of the deposits, because the loss was incurred by his own wrong, and in violation of his sworn duty as prescribed by statute and the express demands of the plaintiff, the heir at law. The bank broke long after the year expired, and after the demands were made on him by the heir, and there was, therefore, no necessity or excuse to keep the money in bank, for it should have been paid and the estate settled up and distributed long before.

V. If from necessity the money is placed in a bank during the time of administration, and the bank fail, the executor is not responsible; but if the bank fail after the necessity ceases the executor is responsible. *Bacon v. Clark*, 3 Mylne & Craig, 295; *Williams on Executors*, 1420-1538; 3 *Leading Cases in Equity*, 446; *Estate of Millenovich*, 5 Nev. 177; *Wagenblast v. Washburn*, 12 Cal. 208.

George S. Hupp, for Respondents.

The main question presented is, whether the defendant Wixom, is chargeable with such laches as to render him liable, as a matter of law, or is to be entitled to have that issue determined by a jury, upon the facts. The question of negligence is one of fact, as well as of law, and defendant claims the right to submit the facts to a jury. Suppose he should prove that the sale of the vineyard stock was deferred to a time subsequent to the failure of said bank, by the express direction of the appellant! *Powell v. Evans*, 5 Vesey, 839.

By the Court, GARBER, J.:

This is an action on the official bond of the defendant Wixom, as public administrator; the other defendants are the sureties on the bond. The condition of the bond is that: "Said Wixom shall

well, truly and faithfully perform all and singular the duties, of every nature whatsoever, appertaining to said office, required of him to be done and performed by the laws now in force, or that may be enacted by the legislature of the state of Nevada, subsequent to the execution of this bond." The breaches assigned in the complaint are that Wixom violated his trust; *first*, in refusing to account for his administration, until one year after the time required by law; and, *second*, in refusing to pay over and deliver to the plaintiff the residue of the estate, as required by the decree of distribution set forth in the complaint. The defendants filed an answer, and the plaintiff moved the court to strike out the answer and for judgment according to the prayer of the complaint. The motion was denied, and the plaintiff declining to offer any testimony, judgment on the pleadings was rendered in favor of the defendants. It is contended for the appellant, that the answer fails to deny the material allegations of the complaint, and that the only question to be determined is, whether the plaintiff is entitled to judgment upon such admitted allegations. In his argument in favor of an affirmative answer to this question, counsel assumes as matter of fact, that the complaint shows that Wixom was appointed administrator of the estate of Robert McNabb, deceased, on the fourteenth day of March, 1868, and received letters on the sixteenth day of March, 1868: that he refused to file his account, until he was finally compelled to do so, on the fourteenth of June, 1870, by compulsory citation; that from March 16th, 1869, to October 1st, 1869, the plaintiff often demanded of him to file his account; that according to his final account, rendered June 14th, 1870, he had in his hands, belonging to the estate, the sum of \$1,965; of which sum, the two principal items were two certificates of deposit of money in the First National Bank of Nevada, one for \$175 currency, and the other for \$1,400 gold coin; and that these certificates were by him presented to said bank, and said deposit caused by him to be placed to his credit as administrator; and that afterwards, in October, 1869, the bank failed and the deposits were lost.

As matter of law, counsel argues: "That the statute requires accounting and settlement of the estate on the expiration of one year from the time of the appointment of the administrator. Sec

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tion 230, Probate Act. And upon the final accounting, the estate must be distributed. Section 260. Then it was the duty of Wixom to file his final account on the seventeenth of March, 1869. He was required by statute and the demands of the heir, to account, settle and distribute the estate in March, 1869. The bank failed seven months after that time. Had he performed his plain duty, the funds would not have been lost." It would seem then, that the right of the plaintiff to recover, on the pleadings, the whole amount in dispute, is rested solely on the first breach assigned.

We quite agree that an administrator is bound to the exercise of care and diligence, such as prudent and judicious men ordinarily bestow upon their own important affairs; that it is his duty to settle and distribute the estate with as little delay as practicable; and that whenever he does what the law prohibits, or fails to exercise reasonable care and diligence in the endeavor to do what the law enjoins, he and his sureties are liable for the damage consequent upon such act or omission. So long, then, as it continued to be the duty of Wixom, as administrator, to retain this money in his custody, he had the right to deposit it for safe keeping in a bank of good standing and credit. This is exactly what prudent and judicious men ordinarily do with such of their own funds as the exigencies of their business require them to keep on hand.

But when the administrator allows the money, so deposited, to remain in the bank after the time when, if he had fulfilled his duty, it would have been distributed and in the hands of those entitled to it, an entirely different case is presented. In such case, the neglect of his duty is a breach of the condition of the bond; and if the money is lost by reason of such neglect, the sum lost constitutes the measure of damage. Upon this principle, it is held that a sheriff, failing to pay over money collected on execution, until after the time it was his duty to pay it over, cannot devolve upon the party entitled any loss which results from the depreciation of the money which, when collected, was current and of specie value. *Wallace v. Graham*, 13 Rich. (Law) 322. So, an action lies against an attorney, for not obtaining judgment as soon as he ought, upon the allegation, *inter alia*, that the defendant could and might, in case he had prosecuted the action with due diligence and dis-

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patch, have obtained judgment at a certain term. 2 Chitty 374.

But we think it cannot be affirmed, as a proposition of law necessarily resulting from the untraversed allegations of this complaint that it was the duty of Wixom to file his final account on the seventeenth of March, 1869, and to have completed the distribution of the estate prior to the failure of the bank, in October, 1869. Probate Act, Secs. 249, 250.

Possibly, notwithstanding the lapse of a year since his appointment, and the sufficiency of the funds in his hands for the payment of debts, the estate was not in a proper condition to be closed. For instance, the title to the assets may have been involved in litigation. But, by no admitted allegation of the complaint is it directly averred that Wixom had in his hands funds sufficient for payment of all debts on the seventeenth of March, 1869, or that he had such funds in time to enable him to procure and carry out with a decree of distribution before the failure of the bank. The averment that he filed an inventory showing that the money came into his hands, is by no means equivalent to an averment that he then had the money. The inventory is not conclusive, either for or against the defendants, but is open to denial or explanation. *Hoover v. Miller*, 6 Jones' Law, (N. C.) 80; *Cameron v. Cameron*, 15 Wis. 1; *Willoughby v. McCluer*, 2 Wend. 608. The decree of settlement does not even purport to decide what period intervened between the receipt of the money by Wixom and the failure of the bank; and it does not appear that, in the proceedings for distribution, the time of the receipt of the money was in issue. *King v. Chase*, 15 N. H. 9.

The uncontroverted allegations are, therefore, insufficient to warrant a judgment on the pleadings for the amount deposited in the bank, so far as the recovery depends upon the first breach assigned. *Letters v. Cady*, 10 Cal. 533; *Green v. Palmer*, 15 Cal.; *Russell v. Mann*, 22 Cal. 132; *Racouillat v. Rene*, 32 Cal. 455; *Adams, etc. v. Whedon*, 31 Conn. 118; *Ralston v. Strong*, 1 Conn. (Vt.) 293. The facts alleged, so far as they are not denied, constitute at most but *prima facie* evidence that Wixom failed to perform his duty, and that in consequence the loss occurred.

We have no doubt, however, that for the second breach assigned, the plaintiff was entitled to a judgment against all the defendants for the whole amount ordered to be distributed, (whatever that may be) if the sureties are bound by the operation and effect of the decree of distribution, or for the amount admitted by the answer to have been in the hands of the administrator subject to distribution, if the sureties are not so bound. We are speaking, of course, of the judgment to which the plaintiff was entitled on the pleadings, not of that to which he may entitle himself by the proofs.

The decrees of settlement and distribution are binding upon Wixom. Whether, as against the sureties, they are conclusive, or even *prima facie* evidence of anything more than the fact of their rendition, is a question which has not been argued, and which for that reason and because of its importance we do not now decide. Besides, on the decision of this may possibly depend the materiality of other questions, namely: Does the decree confirming the final account adjudicate that Wixom was, or that he was not, guilty of a devastavit to the amount of the sums deposited? Or, does it fail to decide the point? And is the hearing of a petition praying for an order of distribution the proper time and place to determine whether anything which ought to be accounted for by the administrator has been omitted, especially where an account has been settled since the alleged devastavit occurred?

The condition of the bond in suit, it will be observed, differs from that in use in most, if not all, of the states where it is held that the sureties of an administrator are bound by such decrees rendered in the probate court. These decisions seem to turn mainly on the terms and construction of the condition of the bond. See *Lipcomb v. Postell*, 38 Miss. (9 George) 476; *Ordinary v. Condy*, 2 Hill, (S. C.) 313; *Tracy v. Goodwin*, 5 Allen, (Mass.) 409; *Dane v. Gilmore*, 51 Maine, 544; *State v. Jennings*, 14 Ohio St. 75; *Irwin v. Backus*, 25 Cal. 222; *Pico v. Webster*, 14 Cal. 202; 2 American Leading Cases, 440 *et seq.* The same may be said of the cases which hold that in an action on the bond, the court will not go into the accounts of the administrator, nor give damages for the non-payment or non-delivery of a distributive share,

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until a decree in probate has ascertained and adjudged the precise amount of the shares, and ordered its payment or delivery to the proper persons. *Archbishop, etc., v. Tappen*, 8 B. & C. 151; *Ordinary v. Mortimer*, 4 Rich. (Law) 271; *Chairman v. Moor*, 2 Murphy, 22; *Chairman v. Hicks*, 1 Murphy, 437; *Blakeman v. Sherwood*, 32 Conn. 328; *Moore v. Holmes*, 32 Conn. 56; *Hurlburt v. Wheeler*, 40 N. H. 73; *Wiley v. Johnsey*, 6 Rich. (Law) 358; *Ordinary v. Hunt*, 1 McM. (S. C.) 382; *Jones v. Irvine*, 23 Miss. 361; *Burrus v. Thomas*, 13 Smedes & M. 454.

On the other hand, strong arguments from convenience and the purview of our probate act commend the adoption of the rule prevailing in those states in which the decrees bind the sureties equally with the principal. The answer does not, by failing to deny the demand and refusal, admit the conversion alleged. *Colton v. Sharpstein*, 14 Wis. 232; *Hill v. Covell*, 1 Comstock, 524. The judgment is reversed and the cause remanded.

ADAM GERHAUSER, RESPONDENT, v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY, APPELLANT.

INSUFFICIENCY OF EVIDENCE TO BE SPECIFIED—PRESUMPTIONS IN FAVOR OF RESPONDENT'S TESTIMONY. Upon an appeal on the ground that the judgment is not justified by the evidence, the Supreme Court will confine itself to the particulars specified in the statement; and in case of material conflict, it will assume the facts as testified to on the part of respondent.

INSURANCE—MISSTATEMENT OF FACT KNOWN TO INSURER. Where the owner of a brick house, which he had kept insured, found it necessary on account of the settling of one of the walls to replace it temporarily with wood, which the insurance agent knew; and upon taking out a new policy the owner stated to the agent that the building was in good repair, but in the same conversation mentioned the fact of the wooden portion still remaining: *Held*, no such misrepresentation as would vitiate the policy.

DEPRECIATION OF PROPERTY INSURED. Where furniture was insured at its full value with the knowledge of the insurer, and was kept insured for the same amount for a number of years, while by ordinary wear and tear and the condition of the building where it was, and which was known to the insurer, it depreciated in value: *Held*, that the mere fact that such furniture was not

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less than the amount for which it was insured the last time did not vitiate the policy.

DESCRIPTION OF BUILDING IN POLICY NOT A WARRANTY. Where a policy of insurance described the building insured as a "brick building," and it appeared that on account of the settling of one of the walls it was found necessary to put in temporarily a wooden substitution, which the insurer knew: *Held*, that the description in the policy was not a warranty that the building was entirely of brick.

CONSTRUCTION OF POLICY—DOUBTS IN FAVOR OF ASSURED. If on the face of a policy of insurance there is, in the language used or its effect, any room for construction or doubt, the benefit of the doubt must be given to the assured.

INTERPRETATION OF LANGUAGE OF POLICIES. In the construction of policies of insurance, such meaning should be given to the language used as plain men usually attach to it.

DESCRIPTION USED BY INSURANCE AGENT. Where on account of the settling of one of the walls of a brick building, it was found necessary to replace a portion of it temporarily with wood; and while in that condition it was insured, with full knowledge of its condition, as a "brick building": *Held*, that notwithstanding the wooden portion the building was not incorrectly called a brick building; but whether it was or not, the insurer could not take advantage of a misdescription knowingly used by its own agent, who drew the policy.

IF FALSE STATEMENT WORKS FORFEITURE OF POLICY. In order to work a forfeiture under a clause in a policy of insurance, which declares a forfeiture in case of fraud in the claim made for a loss or false declaring or affirming in support thereof, the false statement must be wilfully made with respect to a material matter, and with the purpose of deceiving the insurer.

STATEMENT OF LOSS NOT CONCLUSIVE PROOF OF FRAUD. There is no rule in insurance cases that a verdict for plaintiff, finding the value of the property to be at only one-half or one-third the valuation given in the statement of loss, shall be set aside as of itself evidencing fraud in such statement.

OBJECTION OF IMPROPER TESTIMONY MUST BE AFFIRMATIVELY SHOWN. Where it was objected on appeal that a witness had been allowed to answer an improper question, but the record failed to show what the answer was: *Held*, the presumption was that the answer was harmless.

TESTIMONY ON FORMER TRIAL OF ABSENT WITNESS NOT ADMISSIBLE. The rule that the testimony of a deceased witness given on a former trial of the same case may be proved by secondary evidence and so be admitted, does not apply to the case of an absent witness.

WHAT FACTS MUST BE DISCLOSED. Where the jury in an insurance case was instructed that the mere failure of the insured to disclose material facts known to the insurer or unknown to the insured would not prevent a verdict, and such instruction was pertinent to the testimony: *Held*, no error.

REMOVING QUESTION OF FACT FROM JURY PROPERLY REFUSED. Where the court in an insurance case refused to instruct the jury that if it failed to deliver to defendant an account of the destruction of the

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property insured as required by the policy, they should find for defendant. *Held*, properly refused; for the reason that it took from the jury the question whether defendant had not, as plaintiff claimed, waived such statement.

MISREPRESENTATION BY INSURED—QUESTION OF FACT. The question whether representations made by an insured person are materially untrue, or untrue in some particular material to the risk, is a question of fact for the jury.

CONSIDERATIONS PERTINENT TO QUESTION OF MISREPRESENTATION. Where in an insurance case the effect of an instruction, asked by defendant in reference to alleged false representations by the insured, would have been to prevent the jury from drawing a conclusion from the whole conversation whether or not the insurer was sufficiently informed as to the true condition of the property, *Held*, properly refused.

INSTRUCTIONS—STRIKING OUT REITERATIONS. It is no error to modify an instruction by striking out a portion of it, if such portion be merely a repetition of what is given in another part of the charge; it being sufficient if the whole series of instructions when read in connection correctly express the law as requested.

SUBMITTING REJECTED PORTIONS OF INSTRUCTION ONLY PARTLY OBLITERATED. Where an instruction was modified by rejecting a portion, and such rejection was indicated by passing through the rejected words the stroke of a pen, leaving them still legible; in which state the instruction was handed to the jury: *Held*, that unless the attention of the court had been called to the error, and it had refused to allow the instruction to be re-written, no complaint by the jury having been misled thereby could be entertained.

JURY TO DETERMINE WHAT CHANGE IN BUILDING IS MATERIAL TO FIRE RISK. Where in an insurance case the court refused to instruct that a certain substitution of wood for a portion of a brick wall was material, and left it to the jury to determine as a question of fact; and there was nothing in the policy or the nature of a warranty as to what condition of the building or representations thereof should be deemed material: *Held*, no error.

AGREEMENT AS TO WHAT SHALL BE MATERIAL REPRESENTATION. Parties to a contract of insurance may decide for themselves what facts or representations shall be deemed material, either by converting the representations into a warranty or stipulating as to their materiality; and when they have so agreed, the agreement precludes all inquiry upon the subject.

MATERIALITY OF REPRESENTATION NOT TO BE ASSUMED AGAINST INSURED. As a warranty will not be created or extended by construction or implication, so the intention of the parties to an insurance contract to conclude by stipulation the question of the materiality of a representation should be clearly manifested; and in case of doubt, the doubt is to be resolved in favor of the insured.

WRITTEN INSURANCE CONTRACT VITIATED BY PAROL.—MATERIAL MISREPRESENTATION—BURDEN OF PROOF. Though as an ordinary rule, written contracts cannot be controlled by antecedent or contemporaneous statements not embraced in the writing, in the case of a policy of insurance a recollection

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may be prevented by proof of verbal misrepresentations which, though undesigned, were material to the risk ; but the burden of proof is on defendant to show the misrepresentation, and that it was material.

DIFFERENCE BETWEEN CIVIL AND CRIMINAL PRACTICE AS TO REFUSING INSTRUCTIONS. The rule in criminal cases, that when an instruction is refused for the reason that it has already been given, the court should so inform the jury, does not apply in civil cases.

APPEAL from the District Court of the First Judicial District, Storey County.

This cause, which was before the Supreme Court on a previous appeal, (reported 6 Nev. 15) was an action on two policies of insurance, one in the sum of \$5,000 on a brick building in Virginia City, the other in the sum of \$7,000 on the furniture and merchandise therein contained, all of which were consumed by fire November 14th, 1868. There was a verdict and judgment in favor of plaintiff in the sum of \$9,500, with interest thereon from the date of the fire.

Plaintiff's instructions marked "D," "C" and "E," mentioned in the opinion of the court, were in reference to what constituted a "false declaring or affirming" within the meaning of the eleventh condition endorsed upon the policies.

Defendant's instruction "J," which was refused, was as follows :

"J. If plaintiff failed to deliver to defendant or its agents an account of his loss or damage on account of the destruction of the building insured by policy No. 665,769, as required by the eleventh condition endorsed on said policy, then as to that policy the jury must find for the defendant."

The question asked the plaintiff's witness Ritter, and defendant's objections to it, will be found below in appellant's sixth point.

Williams & Bixler, for Appellant.

I. Plaintiff told defendant's agent that the building was in good order and repair, and it was not so. He knew that he had been compelled to pay a high premium by reason of the condition of the rear wall, and that his policies had been kept up at a high rate with the understanding that the rate should be reduced whenever that

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wall was repaired. He knew, therefore, the meaning of the term "in good order and repair," and he knew that if he had disclosed the truth the high rate would have continued. His statement therefore, amounted to a misrepresentation.

II. Plaintiff did not disclose the general dilapidated condition of the house, nor the condition and state of repair of the furniture. The contract of insurance is one in which underwriters act on the representation of the assured, and that representation ought consequently to omit nothing which it is material for the underwriters to know. *Columbia Insurance Co. v. Lawrence*, 2 Peters, 241; *N. Y. Bowery Fire Insurance Co. v. N. Y. Fire Insurance Co.*, 17 Wend. 306; *Cumberland Valley Mutual Protection Co. v. Schell*, 29 Penn. State, 36; *Smith v. Insurance Co.*, 17 Penn. State, 261; 3 Wood and Min. 533; 1 Story C. C., 62; 1 All. 309; 6 Cushing, 48; 10 Cushing, 449.

III. The building is described in both policies as "a brick building"; this amounts to a warranty that the building was in fact a brick building. *Fowler v. Aetna Fire Insurance Co.*, 6 Cow. 673; *Silem v. Thornton*, 77 Eng. Com. Law, 880; *Wall v. E. River Mutual Insurance Co.*, 3 Selden, 373. The same rules apply to the furniture as to the building, because the condition of the building always controls the premium upon the property in it. *Gould v. N. Y. Mutual Fire Insurance Co.*, 47 Marine, 403.

IV. Plaintiff failed to make a statement of his losses as provided in the eleventh subdivision of the conditions endorsed on the policy and therefore cannot recover. He stated, among other things, that his house was completely and expensively furnished, and that the cash valuation of the household furniture at the time of the fire was \$6,000 in coin. In this there was both fraud and falsehood. The verdict of the jury found the value of the furniture at \$3,000. These differences in value from the valuation in the statement are so great as to render it utterly impossible that the valuation in the statement could have been the result of a mere error of judgment and they manifest fraud and false swearing. *Levy v. Ballie*, 7 B. & Ham, 349; *Hoffman v. Western Marine Fire Insurance Co.*, 10 Louisiana Annual, 206.

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V. Plaintiff made no statement of loss sustained by destruction of the building. The statement made applied entirely to the household furniture and merchandise. That statement might have been a sufficient account of loss under one policy, but it does not follow that a statement of loss under the other policy covering the building should be considered waived. A waiver of such a condition of the policy is not lightly to be presumed, but should be based upon either express acts or declarations of the insurer, or upon such facts or circumstances as necessarily lead to the conclusion that a waiver was intended. *Macomber v. Cambridge Mutual Fire Insurance Co.*, 8 Cush. 133; *Columbian Insurance Co. v. Lawrence*, 2 Pet. (N. S.) 53; *Wellcome v. People's Equitable &c. Insurance Co.*, 2 Gray, 480.

VI. The witness Ritter was asked, "What were new cornices of brass worth in the city of Virginia on the fourteenth day of November, 1868"? This was objected to as irrelevant, as not asking the value of any particular character of cornices, nor of any cornices destroyed by the fire. The question before the jury was, the actual value of the property destroyed, and not the value of something else. The question was therefore clearly obnoxious to the objections taken.

VII. The exclusion of Mrs. Reed's testimony was error. The identical point is decided in *Magill v. Kauffman*, 4 Sergeant & Rawle, 316.

VIII. [The objections of counsel to the various instructions and the grounds of their objections are stated in the opinion of the court.]

IX. Touching questions arising upon the conditions of the policies, the contract of the parties should be enforced, and the court has no power by construction to add to or take from it. *Healy v. Imperial Fire Insurance Co.*, 5 Nev. 274.

Mitchell & Stone, for Respondent.

I. So far as questions of fact are concerned, they were submitted to the jury; and admitting that there was conflict of testimony, the

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verdict would not be disturbed. *Reed v. Reed*, 4 Nev. 394 ; *Cal-
lyon v. Lannan*, 4 Nev. 156.

II. Defendant did not rely entirely upon the representations plaintiff concerning the conditions of the property. It had full knowledge of the condition of the building at the time of issuing the policies through its agent. The house was in good order and repair with the wooden rear wall, and plaintiff did not suppress any facts relating thereto.

III. Plaintiff made a statement of his loss, and was told that was all that was required, that it was all right. It was sufficient unless there might be a technical defect, in which case it became the duty of the insurers to have notified plaintiff of such defect. The objection to pay was upon other grounds, and there was no objection to the sufficiency of the preliminary proof. 16 Wend. 385 ; 9 How. (U. S.) 390 ; 2 Peters, (U. S.) 25 ; 10 Peters, (U. S.) 507 ; Angell on Fire and Life Insurance, Sections 240-248, notes and authorities.

IV. As to the objection to the testimony of the witness Ritter, the record only discloses the question, the objection and ruling of the court. Every intendment is in favor of the ruling, and the record showing the bare question among the alleged errors of law, without giving the evidence of the witness preliminary to the question asked, showing its irrelevancy, the point ought not to be entertained. But the question was proper. The question just before was as to the value of second-hand cornices, but the object of both questions was to bring before the jury the value of the article new and its value after being used, so that they might, from the testimony of other witnesses as to the use of it shown, ascertain the true cash value of the furniture.

V. The testimony of Mrs. Reed given on a former trial, she being out of the state, was properly excluded. The substance only of her testimony upon a particular subject was offered, and it did not appear that it was the whole of what she testified on that subject. The principle itself of admitting such testimony is exceedingly dangerous, and the judge may exercise legal discretion as to the degree

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of secondary evidence necessary. Authorities cited by appellant ; 1 Greenleaf on Ev., Sections 163–167.

VI. Instruction “A” was not erroneous. The assured is not bound to state his opinions, or belief or conclusions respecting the facts communicated, nor to communicate matters which lessen the risk, or which are known or ought to be known to the underwriter, or which are equally open to both parties, or which are general topics of conversation, or are subjects of warranty. 2 Greenleaf on Ev., Section 397 ; Marshall on Ins., 453–473 ; *Green v. Merchants’ Ins. Co.*, 10 Pick. 402.

VII. The construction of the terms “false declaring or affirming” in the policy was correct. *Gerhauser v. North British and Mercan. Ins. Co.*, 6 Nev. 15 ; Angell on Ins., 260 ; *Levy v. Baille*, 7 Bing. 349.

VIII. Instruction “J” was properly denied, because it excluded from the jury the question of waiver of statement.

IX. The principle upon which policies are vitiated is that the underwriters are deceived. It cannot be said defendant was deceived if it had knowledge of the condition of the property, whether the representations were true or false.

By the Court, GARBBER, J. :

This is an action on two policies of insurance, issued March, 1868. The plaintiff recovered \$9,500. The defendant moved for a new trial, which was denied. The first question presented is, whether the evidence was sufficient to justify the verdict. In deciding this question we are confined, of course, to the particulars specified in the statement, and in case of material conflict we must assume the facts to be as testified to on behalf of the plaintiff.

The particulars specified are in substance : 1st, That in procuring the policies, the plaintiff misrepresented the value of the property, and concealed and misrepresented the true condition of the south and west walls of the building, and the value of the furniture in matters material to the risk, and unknown to defendant. 2d. That the plaintiff violated the first subdivision of

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the conditions indorsed on the policies, by failing to describe truthfully, and by misstating the construction of the building and the materials of which it was composed, and particularly by stating that the building was in good order and repair. 3d. That the policy was issued on a "brick building," represented to be in good order and repair; but as part of the walls was of wood, it was not as represented, and was not the property insured. 4th. That no statement of his loss by destruction of the building was made by plaintiff, as required by the eleventh subdivision of said conditions, and that he was guilty of fraud and false declaring in making his statement of loss by destruction of the furniture. 5th. That the jury overestimated the value of the property burned.

The testimony as set forth in the statement shows that in 1864, and ever since, one Harvey was the agent of the defendant, clothed with and exercising full power and authority to manage and transact all its business. He resided in Virginia City, where the property insured was situated, until August, 1864, since which time defendant had no agent there until June, 1868, except that during a portion of the year 1866, it had a correspondent in that place, and that Harvey was there on a visit and saw the insured premises in March, 1865. In 1864, plaintiff first insured with defendant the house and furniture in question. This insurance was made after a personal inspection and survey by Harvey. Since then, from year to year, defendant has issued other policies insuring this property on the application of the plaintiff, at the office of defendant in San Francisco, the last being those in suit issued March, 1868. In May, 1865, in consequence of excavations made by the Savage Mining Company, the ground under the building began to settle, and settled to such extent as to necessitate the taking down a portion of the rear wall. The plaintiff concluded to put up a temporary wooden wall, and May 14th, 1865, wrote a letter informing defendant that the foundation was settling and the walls weakened and crumbling, and that it was necessary to put in a temporary wooden wall. To the erection of this wooden wall, to remain only until the building could be repaired, the defendant consented, requesting to be informed how long it would take to complete the repairs, and stating that

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additional premium would be charged if it took more than fifteen days. May 19th the plaintiff replied to this, that he had completed the removal of the portion of the wall which he intended to remove, and was then erecting in its place a wooden wall; that he could not say when the brick wall would be restored, as the foundation had been settling, and he preferred to let the wooden wall remain until the foundation became firm and secure, and to pay the additional risk required to allow the policies to cover the building in its changed condition. To this defendant agreed, and plaintiff continued to pay the additional risk until March, 1866, when the policies were renewed, the premium being fixed at $2\frac{1}{2}$ per cent., to be reduced to the rate of $1\frac{1}{2}$, the same charged on the first policies issued, when the rear wall should be rebuilt of brick. In March, 1867, the policies were again renewed, without question as to the condition of the wall or building, at a premium of 2 per cent. In the summer of 1867 a portion of the south wall fell in, and was replaced with wooden studding and boards. Up to March, 1868, the settling had continued, and the building had become considerably racked, and the furniture had, of course, depreciated in value by time and use. What occurred when the policies sued on were issued is matter of dispute. Harvey testifies that he then knew nothing about the condition of the building, except what the plaintiff then told him, and what he had learned from the correspondence, and a diagram received from plaintiff in March, 1865, showing the alterations in the rear wall; that plaintiff said nothing about the change in the south wall; that when plaintiff applied to him for this last renewal, he, Harvey, said: "You have been paying a high rate. Have you put your building in proper repair?" That plaintiff answered that he had, and Harvey then told him that he would reduce the rate to $1\frac{1}{2}$ per cent.; that nothing was said about the condition or value of the furniture; that "according to the customs of the insurance business, all houses having part of the walls wood, are classed as wooden buildings, and not insured, if at all, under 2 per cent."; that he did not reduce the rate on account of competition, and did not tell plaintiff so. The plaintiff testified that he told Harvey of the change in the south wall, and that he told him the building was in good repair, and so considered

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it with the wooden substitutions; that Harvey gave as a reason for lowering the rates, the competition then existing, and that Harvey made out the policies and sent them to him from San Francisco.

The first subdivision of the conditions reads: "Every person desirous of effecting an insurance must state his name, place of abode, and occupation; he must describe the construction of the buildings to be insured, where situate and in whose occupation, what materials the same are respectively composed, and whether occupied as private dwelling houses or otherwise; also the nature of the goods or other property on which such insurance is proposed, and the construction of the buildings containing such property, and whether there be any apparatus in or by which heat is produced other than grates in common fire-places, in any of the said buildings or connected therewith. *Any misstatement in the above particulars will vitiate this policy.*" Harvey also testified that if plaintiff had applied to any one else in the office, a written statement under this subdivision would have been required of him; but that when the application was made to him, it was his habit to dispense with such writing.

It cannot be denied that persuasive arguments can be and are adduced to prove that the version of Harvey is the more probable; but much can be said in favor of the conclusion reached by the jury, and approved by the able and experienced judge before whom the case was tried. Giving credence to the version of the plaintiff it shows that he was guilty of no misstatement whatever. If true, he stated that he had put the building into good repair, but he also informed the agent, in the same conversation, that a portion of the south wall had been removed and replaced by wood studding, &c. Both Harvey and the plaintiff were well aware of the condition of the rear wall, and that the foundation had been settling. The plaintiff may have been mistaken in thinking that the building was in good repair, or he may have answered the question without duly weighing the import of the language used, but coupled with the distinct statement as to the condition of the south wall, and construed in the light of the previous correspondence, it is not easy to see how Harvey could have been misled.

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the answer. If, as counsel argue, it is a solecism to say that a building with its south and rear walls in the condition described is in good repair, then, taking the whole conversation and construing it in connection with the previous communications, it did not amount to a representation of good repair. No more than an assertion that one is a thief, because he stole a tree, amounts to an imputation of larceny.

In support of the specification that the plaintiff was guilty of concealment, it is urged that he failed to state the fact that, owing to the condition of the furniture, it was worth less than the sum for which it was insured, the fact of the unrepaired condition of the rear wall, and the "generally racked, cracked and unsafe condition of the building." But the jury may well have found that there was no concealment. Harvey had seen the furniture, and must have known that it had deteriorated in value by four years' wear and tear: and when he was told of the condition of the south wall, he must have inferred that the settling had continued, and that the rear wall had never been rebuilt of brick. If he desired further information on these points, it became his duty to ask for it, when thus fairly put upon his guard. As to the value of the furniture, there is a plain conflict of testimony.

It is argued that the description in the policies amounts to a warranty; that they describe this as a "brick building"; that the warranty was broken, as the walls were partly of wood. We may, in considering this point, leave out of view the evidence of custom or usage relied upon by appellant. The only testimony tending to establish the custom was the general remark of Harvey, above quoted. There is nothing to show that such custom was so general or uniform, or of such notoriety or acceptance, that the plaintiff can be presumed to have known of, or to have contracted with reference to, its existence. See also *Treadway v. Sharon, ante*. We think the description was inserted, not by way of warranty, but to identify the premises. If, on the face of the writing, there is room for construction or doubt, the benefit of the doubt must be given to the assured. It has been well said, that such clauses in a policy should be so framed that he who runs can read; that as such contracts are often entered into with men in humble conditions of life,

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who can but ill understand them, it is clear that they ought not to be so framed as to perplex courts and lawyers, and so that a prudent man can enter into one without an attorney at his elbow to tell him what the true construction of the document is. And as to the warranty, it has not been proven untrue. In common parlance this was a "brick building"; and we must give to the language that meaning which plain and unlettered men usually attach to it. But the verdict can be supported on another principle. In *Smith's Leading Cases*, pp. 789-791, it is said: "The opinion would seem to be, that whenever the error of which the insurers seek to take advantage is occasioned by them or by those for whom they are responsible, they will be equitably estopped from setting it up as a defense, whether it occur in a representation or in a warranty." If, then, plaintiff told Harvey of the wooden structure in the south wall, and if that amounted to telling him it was a wooden building, Harvey should have so described it in the policy. The company was responsible for his omissions, and cannot escape liability by reason of any discrepancy between the facts as disclosed to him, and his presentation of them in the papers. It cannot saddle the blunder of its own agents on plaintiff, and thus take advantage of its own wrong. *May v. Buckeye, &c.*, 25 Wis. 4 R. I. 141; 3 Keyes, 91; 50 Penn. 331; 40 N. H. 333-34; 29 Conn. 10; 50 Ill. 111. This harmonizes with the general rule that "when a purchaser is acquainted with the real nature of the thing which he purchases, he cannot rely on a failure to accord with the representation or description given of it by the vendor, as a breach of either of a warranty or of the substance of the contract."

The eleventh subdivision of the conditions, after providing that plaintiff should make proof of his loss, declares a forfeiture in the event of fraud in the claim made for such loss, or false declaring or swearing in support thereof. In due time, plaintiff made a statement of his losses. In it he valued the furniture "at about \$6,000 having cost said sum within the space of four years anterior to the date of the hereinafter described fire." This statement also avers that he was the holder of the policy on the building, as well as that on the furniture. A few days after the fire, plaintiff was in the office of defendant in Virginia City. The agent of defendant

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gested to plaintiff that a statement of his losses be made, and accordingly he made the statement referred to. The agent then told him it was all that was required, and was all right.

In order to work a forfeiture under this subdivision, the false statement must be wilfully made with respect to a material matter, and with the purpose to deceive the insurer. *Marion v. Great Republic, &c.*, 35 Mo. 148. Applying this rule of law to the testimony, I cannot say that the jury came to an erroneous conclusion on this point. The statement was evidently intended to embrace both policies; and if it was technically defective in this regard, fair dealing required the defendant to point out the defect. On the contrary, there is evidence that the agents of defendant expressly waived any further statement, and induced the plaintiff to rely upon that furnished. The law is well settled in this respect, and settled in accordance with the plainest dictates of reason and conscience. 14 Md. 295; 2 Ohio St. 476; 32 N. Y. 441; 20 Grattan, 312.

Some of the authorities seem to hold that where the verdict finds the value of the property to be only one-third or one-half the valuation in the statement of loss, the verdict should be set aside as itself evidencing fraud, etc., in the statement. Here the verdict fixes the value of the furniture at \$3,000, but the statement gives it as \$6,000. But this cannot be law. The verdict is compounded of the varying estimates of twelve men, made on conflicting statements of witnesses; it is often the result of a mere compromise of opinions; it will stand, though based upon evidence evenly balanced by evidence corroborating the statement. To hold it conclusive, not only of an overestimate but of a fraudulent overestimate, is altogether too arbitrary and harsh a rule, especially where the same finding, as here, negatives the existence of actual fraud, and the valuation in the statement is not positive, but is in terms the expression of an opinion deduced from given facts. Of course, there may be cases where the overvaluation is so glaring that the disproportion will amount to proof of fraud; but it is every day's experience that honest men will honestly differ as to the value of such property as that here in question, to a greater extent than this verdict differs from the statement.

The remaining assignments are of errors in law. The court al-

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lowed the witness Ritter to answer a question objected to by the defendant. But the statement fails to disclose what the answer was. So far as the record informs us it may have been harmless. "It is not sufficient to show that an improper question was asked a witness, unless it also appear that the answer thereto disclosed improper and illegal testimony, and to the prejudice of the party objecting. *Mays v. Deaver*, 1 Clarke, (Iowa) 222; 8 Iowa, 160; *Johnson v. Jennings*, 10 Grattan, 1.

It appeared on the trial that this case was once before tried in the same court, judgment rendered, and reversed on appeal. That on the former trial a Mrs. Reed was examined as a witness for defendant, and cross-examined by plaintiff; and that at the time of the second trial she was residing in the state of California. Defendant proved by plaintiff's counsel, that the statement of the testimony of Mrs. Reed, as contained in the statement used in this court on the former appeal, was correct, and the substance of what she testified to on the former trial. It being conceded that said testimony was relevant and material, counsel for defendant asked leave to read to the jury a portion of said Reed's testimony from the transcript thereof used on said first appeal—which portion is set forth in the record now before us. Plaintiff objected, and the objection was sustained. All the cases agree that the testimony of a deceased witness, given on a former trial of the same cause, may be proved as secondary evidence—as the best evidence of which the nature of the case admits. But there is a decided and irreconcilable conflict of authority on the question whether, as a foundation for the admission of such secondary evidence, the absence of the witness from the state is equivalent to his death. In *Lightner v. Wike*, 4 S. & R. 204, Chief Justice Tilghman said that the rule of admitting evidence of what a deceased witness swore is founded upon necessity, and is an exception from the general rule, which demands the examination of a witness *viva voce*, and must be extended no further than necessity requires. In *Magill v. Kaufman*, Ib. 319, the same judge extended the exception to the case of a witness absent from the state. He admitted that he could find no express decision on the point, but held that as the handwriting of an absent subscribing witness may be proved, to

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preserve consistency, the absence of a witness from the state should be considered the same thing as his death; and that, if the adverse party desires to prevent the use of the secondary evidence, he should send a commission to examine the witness. Soon after, in *Wilbur v. Selden*, 6 Cowen, 164, the contrary was held, and it was said that the rule as to a subscribing witness was not at all analogous in principle. And the same ruling has been made in other states. 17 Ill. 427; 5 Rand. (Va.) 708; 14 Mass. 234; 2 Blackf. (Ind.) 308. In Cowen & Hill's notes, and in the text of Greenleaf, a decided preference for the Pennsylvania doctrine is expressed, and it has been established in other states either by statute or judicial decision. With all deference to such authority, we think it the safer and better rule, that where the residence of the witness is known, or can be discovered by the exercise of due diligence, and his testimony can be taken by commission, evidence of what he swore on a former trial should be excluded. It will not be denied that his deposition is the primary and best evidence—the necessity for a resort to secondary evidence does not then exist, as in the case of death, and we can see no reason why, in order to escape from the dangers and abuses incident to the use of the secondary evidence, the duty of suing out a commission should be cast upon the adverse party, rather than upon the party seeking to avail himself of the testimony of his own witness. The analogy relied on by Judge Tilghman is by no means perfect. In a late English case, where it was pressed as an argument in favor of the admission of secondary evidence of the contents of a document beyond the jurisdiction, Creswell, J., said: "It is not on the ground that his is the best evidence, that the attesting witness, if procurable, must be called; but because he is the witness agreed upon between the parties." The rule requiring proof by a subscribing witness has long been regarded as a useless formality, adhered to only because courts had no power to dispense with settled rules of law. But that requiring the production of the best evidence is one of substance and wise policy. The former is to be extended no further than strict precedent requires—the latter is dispensed with only in case of necessity, and in the absence of precedent is to be applied to all cases falling within its reason.

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Even in Pennsylvania the analogy is not always followed. Thus they reject the testimony of a witness given on a former trial in case of supervening interest, which, however, they admit will enable the party to establish the execution of a document by proof of the handwriting of a subscribing witness. So if the attesting witness has forgotten the facts or refuses to testify, this will let proof by other witnesses. 1 Starkie Ev. 510. But such forgetfulness or refusal is not a sufficient foundation for the introduction of testimony given on a former trial. 43 N. H. 297. If admissible, the whole of the testimony of Mrs. Reed should have been offered; and it seems it should have been shown that Mr. Mitchell had forgotten what her testimony was. 48 N. H. 282; 17 N. H. 138; 9 Rich. Eq. 429; 15 N. Y. 485; 22 N. Y. 462; 46 Bar. 410. Perhaps, too, the rejection of the transcript may be justified on the ground that it was not a memorandum made by the witness Mitchell, nor one made at or near the time when he heard Mr. Reed testify. It is rested, however, on the first ground, for the reason that it is claimed that the objection made by the plaintiff in the court below was so limited, and the argument on the point made by the appellant, that he cannot take a different position in this court, has been altogether *ex parte*.

The first instruction given reads: "A." "It is not sufficient to aver that, when the application for insurance was made, the insured concealed a fact material to the risk, and which would have increased it if known. It must also appear that the insured knew of the existence of the fact. It is not every fact within the knowledge of the insured that he is bound to disclose, and if such facts as the law or the policy will require him to disclose are within the knowledge of the insurers, or so connected with the property insured that its knowledge may be fairly inferred, a failure to inform the company thereof will not avoid the policy." The defendant excepted generally to the giving of this instruction, and each party thereof, and especially upon the ground "that so much of said instruction as held that it was not the duty of the plaintiff to communicate to defendant all matters material to the risk, was not law and also to that portion of it which referred both to the knowledge of the plaintiff and the defendant, because the same was not per-

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ment to the testimony and was calculated to mislead the jury, it appearing from the testimony that the plaintiff was perfectly familiar with the condition of the property, and that the defendant knew and could know nothing about it, except as informed by the plaintiff." Instruction " B," which was objected to on the same grounds, was to the effect that, if plaintiff failed to disclose the condition of the building, but defendant knew its condition, such failure worked no forfeiture. Instruction " A " is certainly obnoxious to criticism ; but we do not think the action of the court below in overruling the specific exceptions taken constituted such technical error as to warrant a reversal of the judgment. In *Axtel v. Caldwell*, 24 Penn. 90, the instruction was, that a refusal to deliver certain property would dispense with a demand ; and the plaintiff in error contended that, in the absence of evidence to show a refusal, it was an error fatal to the judgment to speak of a refusal at all in charging the jury. It was held that the instruction was a true expression of the law in the abstract—that when jurors are told that a given question is to be determined by them, this is called submitting the fact to the jury ; and if the record show that there was no evidence, direct or presumptive, of the existence of such fact, such submission is error ; because it is tantamount to a charge that there is some evidence of the fact. That the instruction did not submit the question of refusal to the jury, but simply stated a legal principle which had nothing to do with the case. The judgment was therefore affirmed.

Here, the portions of the instruction excepted to substantially assert that the mere failure to disclose material facts, known to the insurers or unknown to the insured, would not prevent a recovery. This is correct as an abstract proposition. It was pertinent to the testimony, so far as it referred to the knowledge of the defendant, and it did not submit the question of the knowledge of the plaintiff to the jury. Further, we are satisfied the jury could not have been misled by the portions of the instruction especially excepted to. They were afterward specifically and correctly instructed on the hypothesis of a concealment of any material fact. 3 Gr. & Waterman, Chap. X, 792–800. The questions raised by the assignments of error in giving the instructions marked " D," " C "

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and "E," have already been considered. Instruction "J" was properly refused, as taking from the jury the question, whether defendant waived the statement required by subdivision eleven.

There was no error in refusing to give instruction "K." It was to the effect that if the plaintiff, in procuring the policies, represented the building as a "brick building" in good order and repair, and if one-fourth or more of the rear wall was composed entirely of wood unprotected by brick, then the building was not according to the true meaning of the term a "brick building," and the jury must find for defendant. The question whether the representations made by the insured are materially untrue, or untrue in some particular material to the risk, is a question of fact for the jury. Besides, there was no evidence that the plaintiff at the time of applying for these policies represented the building as a "brick building." The instruction was so framed that it might lead the jury to believe that they must find the plaintiff guilty of a fatal and material misrepresentation, even if he informed defendant of the change in the south wall.

Instruction "L," requested by the defendant and refused by the court, is more objectionable in this respect than instruction "K." It reads: "L." "If the agents of defendant knew, prior to the issuance of the policies sued on, that the brick wall, to the extent of the south half of the rear wall of said building, had been removed, and a wood wall had been substituted therefor, and they had not seen the building for some time prior thereto, and the jury believe from the evidence that, at the time of procuring said policies, the plaintiff told the agent of defendant from whom he procured them, that he had put said building in perfect repair, then they must find for defendant, it being admitted that said wall remained in that condition at the time of the fire." This was properly rejected, as liable to mislead the jury to the conclusion that they could not find from the whole conversation, as probably intended and understood by the parties, that Harvey was sufficiently informed of the true condition of the property—as excluding from the consideration of the jury the plaintiff's testimony that he told Harvey of the change in the south wall. 21 Md. 551; 27 Mo. 70; 20 Ill. 395.

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requested the instruction marked "M," viz: "If defendant's agents, nor any person acting for defendant's building * * * for several years prior to issuing them defendant's agent relied entirely on such representations as to the condition and state of said building, and the jury believe the plaintiff then misrepresented the condition and state of repair of said building, in view of the risk, they must find for defendant, *even if that plaintiff made such misrepresentations by design.*" The instruction as offered was rejected by striking out the words italicized, and was modified. The defendant "excepted to the refusal of the court as offered by defendant, and to modification of the instruction by the court." It is not the right of counsel to insist to repeat and reiterate the same proposition. The whole series of instructions, when read in connection, fully express the law as requested. Reading this instruction modified, in connection with the instruction marked "14" at the request of defendant, it will be seen that the instruction is substantially, if not literally, as requested. Instruction "14" that false representations concerning the state of repair of a building, in matters material to the plaintiff and relied on by the defendant, are as valid for recovery when made by mistake as when made intentionally, if the only misrepresentation which the evidence shows was one concerning the state of repair of the building, and the modification was made by passing through the words "by design" of the pen, leaving them still legible, and in this form was handed to the jury. If it was feared that the jury, the attention of the court should have been called to the fact, and a specific exception taken in case of the instruction to be rewritten or the rejected instruction modified.

requested the court to instruct as follows: "N." "We find from the evidence that plaintiff in 1867 substituted a cloth for eight inches of brick wall on the south side of the building, embracing a space of fifteen feet or more

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in length and extending from floor to ceiling ; and that he concealed the fact from defendant, either by design, accident, intentional neglect or mistake, and the defendant's officers issued the policy soon in ignorance of such change in the wall, then they must find for defendant, *because such change was material to the risk and ought to have been brought to the knowledge of defendant, some officer or agent of defendant, before the issuance of the policies.*" This was modified by striking out the last thirty-one words, and by inserting after the word " ceiling" the words " and that the said condition of the building was material to the risk." The error assigned is that the court erred in refusing to instruct that the change in the south wall was material, and in leaving it to the jury to find whether the condition of the building resulting from the change was material. The questions raised by this assignment are not free from difficulty, but we think the ruling is sustained by principle and by the weight of authority. 18 N. Y. 170 ; 39 N. Y. 59 ; 6 Jones (Law) 352 ; 40 N. H. 381 ; 20 N. H. 557 ; 18 Ind. 362 ; 2 Parson's Contr. 770. It is not contended that the answer here relied on was a warranty, nor is it denied that, as a general rule, the materiality of a representation is a question of fact to be submitted to and decided by the jury ; but it is contended that the plaintiff, in answer to a specific question, represented the building to be in good repair : that the instruction was framed on the hypothesis that the change in the south wall was made and concealed ; that the truth of this hypothesis is inconsistent with the truth of the representation ; and that, under the circumstances, the materiality of the representation and of the variance between the representation and the fact was a question for the court and not for the jury, because the parties had made the representation material by asking the question to which it was an answer, and by inserting in the condition indorsed on the policy a provision that it should be vitiated by any misstatement as to the construction of the building or the materials composing it ; and because there could be no dispute on the evidence whether the change in the wall increased the risk ; that the court should have assumed that it would be thereby increased, wood being necessarily more combustible than brick and mortar.

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It is undoubtedly competent for the parties to decide for themselves and beforehand what facts or representations shall be deemed material, and where they have so agreed, the agreement precludes all inquiry upon the subject. This they may do by converting the representation into a warranty, or they can, by the form of the contract, stipulate as to its materiality without, however, putting it in other respects on the same footing as a warranty. Here they have not seen fit to make the answer a warranty, which could only be by making it in legal effect a part of the policy.

A warranty—like a covenant, fixing and liquidating the *quantum* of damage—will not be created nor extended by construction or implication. For like reasons, the intention of the parties to conclude by convention the question of the materiality of the answer or representation should be clearly manifested; and in case of doubt, the doubt is to be resolved in favor of the insured. So far as this contract has been reduced to writing, the intention to make the answer material depends solely upon the construction of the proviso concerning misstatements; and this, according to established rules, is either inoperative, as the expression of what is tacitly implied, (98 Mass. 393–4; 12 Cush. 425) or it operates to exclude things which, but for this expression, would have been implied. Had the parties here, as in some of the cases cited, by their contract stipulated for the materiality of this answer—had it been written out, and referred to in the proviso—then, the interpretation of all writings being for the court, the question of the materiality of the answer could not have been left to the jury. But the contract here, by legal intendment, is, that the policy should be vitiated by any material misrepresentation. Ordinarily, in the absence of fraud and mistake, written contracts cannot be controlled by antecedent or contemporaneous statements, not embraced in the writing; but in actions on policies of insurance, a recovery may be prevented by proof of verbal representations, which, though undesigned, *were material to the risk*. In such case, the burden of proof is on the defendant, to show that the plaintiff made the representation, that it was material, and that it was untrue in substantial and material particulars. Cases are cited to show that when the defendant proves that a question is asked by the insurer and an-

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swered by the insured, the court must instruct that the answer is material. The reasoning by which this result is reached, is thus stated in one of the opinions: "An inquiry made by the insurer shows that he deems the matter inquired about material—an answer by the insured admits the materiality. It is an agreement that the matter inquired about is material, and therefore the materiality of such answers cannot be submitted to the jury." It may be questioned, whether the fact that an inquiry is made and answered is anything more than evidence tending to prove materiality, and can hardly be deemed equivalent to a conclusive agreement that the answer shall be considered material. But, waiving this, the court can declare that the parties understood and intended that upon the substantial truth of the representation, regardless of its materiality, the validity of the policy should depend, only where such understanding and intention can be deduced from the written evidence: if the contract is not wholly in writing, and such intention is to be collected from the acts and expressions of the parties the jury must find it. Smith's L. C. 265. And so, it is said, (9 Mass. 402) that, where the materiality of a representation depends upon circumstances, and not upon the construction of any written instrument, it is a question of fact for the jury; but where the representation is in writing, its interpretation belongs to the court. It was further held, that even where, by the form of the policy and the contemporaneous written application, the parties conclusively agree to consider the representation material, it is still a question of fact for the jury to decide, whether the variance between the representation and the existing facts was material—the very question which, in this instruction as offered, it was proposed to take away from the jury.

In *Peterson v. Ellicott*, 9 Md. 60, the court say: "There is no principle better settled than that which denies to the court the right of assuming any fact, when the *onus* of proving such fact rests upon the party asking the instruction, no matter how strong and convincing his proof on the subject may be. * * The instruction should contain, *within itself*, a correct legal principle—whenever one undertakes to set forth facts as the basis of a legal proposition, the facts referred to must be sufficient to warrant the instruction as

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without any extraneous aid." The concealment of the change south wall, and the other facts set forth in this instruction, it, in and of themselves, authorize a direction to find for the plaintiff; and the contention of counsel is, in effect, that the court should have not only decided, as matter of law, that the plaintiff made the state of repair material, but should have assumed the plaintiff had represented the building to be in good repair, that it was not in good repair, because the parties meant by insuring the house in good repair," "replacing the woodwork with iron" — that this had not been done; and that such variance was material. That is, that it not only increased the risk, but so increased it that, if known, it would have enhanced the premium, or voided the insurance. 20 N. H. 551; 8 B. Mon. 642; 30 N. H. 17.

The point now presented is not whether, if these questions had been submitted to the jury, a finding contrary to the assumption stated would have been against the evidence, or the weight of the evidence. Nor is it necessary for us now to go so far as to say, that one of these facts — for instance, the representation of good repair, a conceded fact in the case — could have been assumed in the prayer. But it was not error to refuse to assume other facts. Harvey had insured the property for the same term in 1867, when (the jury may have found) he had every reason to believe it was in substantially the same condition, so far as concerned the risk; and though the rates were reduced in 1868, the jury may have attributed that to the competition then existing, and not to any change in the condition of the property. The meaning attached by the parties to the words "good repair," is self-evident nor undisputed. This was for the jury to ascertain at the first instance, not simply in view of the conversation in which the expression was used, but from that conversation as explained by the previous correspondence and conduct of the parties. The judgment and order should be affirmed, and it is so ordered.

After the rendition of the foregoing decision, a petition for rehearing was filed by defendant. In answer thereto, the following order was filed at the January term, 1872.

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By the Court, GARBER, J. :

Four points are made in the petition for a re-hearing in this case. We have carefully considered the argument of counsel in their support, and the result is a conviction that the petition should be denied.

I. In regard to the testimony of Mrs. Reed, it is admitted that there is a decided conflict of authority on the point suggested. In view of this conflict, we are at liberty to adopt the rule which seems to us supported by the better reason. So far as there has been direct adjudication of the point, it is about equally balanced; and as now presented for the first time, in this state, it is practically *ex nihilo* the first impression—as much so as it was when presented to the judges who decided the cases of *Magill v. Kauffman* and *Wilbur v. Selden*. Then going back to the law as it stood when *Magill v. Kauffman* was decided, we are informed, by the opinion of Chief Justice Tilghman, that there were three recognized exceptions to the general rule, viz: the death of the witness, that he could not be found after diligent search, and that he was kept away by the influence of the adverse party. By analogy to the case of a subscribing witness, he admitted a fourth exception—the absence of the witness from the state. We agree with the conclusion arrived at in *Wilbur v. Selden*, that the analogy was too imperfect to justify the engrafting of the last-named exception upon the law. Where the witness can be found and his deposition taken, neither *expediency* nor *necessity* requires the admission of hearsay as to his previous testimony; 4 S. & R. 204; 1 Nott & McCord, 409; he is not then “in the same circumstances as to the party that is to use him, as if he were dead”; 3 Bac. Abr. 561; and though the deposition falls short of an examination *viva voce*, it is superior to what a witness said at a former trial. *Ib.*

II. The point upon which we sustained the overruling of the objection to the question propounded to the witness Ritter, was distinctly made in the brief of respondent. In the reply, appellant impliedly admitted the correctness of the assumption of fact upon which the point was made, and contended that there was no rule of law requiring the answer to be preserved in the bill of exceptions. The statement, however, shows that the whole value of the corn-

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testified to could not have exceeded the sum of fifty-eight dollars. Even if there was technical error in admitting the testimony, it would not warrant a reversal of the entire judgment; but in support of the judgment, we feel justified in interpreting the statement as showing that, in point of fact, Ritter testified with direct reference to the cornices he had seen in the house of the plaintiff.

III. The third suggestion is answered by the case cited in our opinion, which shows that the instruction did not submit to the jury the question of the knowledge of either the plaintiff or the defendant.

IV. It is now contended that the modification of instruction "M," was error, because of the failure of the court to inform the jury that the concluding sentence was stricken out *for the reason* that it had already been given. Criminal cases decided in this state and California are cited to sustain this position. 1 Nev. 35. What was said on this subject in *People v. Bonds*, was wholly unnecessary to the decision. But admitting that such is the law in criminal cases, we think a different practice has always prevailed and should prevail in the trial of civil causes. 36 Ill. 212; 36 Mo. 162; 14 Iowa, 370; 41 Penn. 242; 15 Texas, 400; 42 Maine, 564; 30 Miss. 120; 11 Md. 451; 8 Blackf. 98; 3 Dana, (Ky.) 36; 1 Black. (U. S.) 537.

In criminal cases, no specific exceptions to the charge are required. In civil cases, the point of the exception must be particularly stated; and where the whole charge correctly states the law as requested, a party cannot assign for error any mere ambiguity in the instructions, or that they were calculated to mislead—no erroneous proposition of law being asserted—unless he ask an explanation of them to the jury at the time they are given. 35 Ala. 653; 23 Ill. 380; 23 How. (U. S.) 189; 20 Texas, 226; 28 Ala. 641; 10 Ind. 90; 9 Ala. 63; 19 N. H. 377; 5 Met. (Mass.) 151; 19 Pick. 311.

Counsel ask "how could we object to a particular mode of modification of which we were wholly ignorant"? It seems to us that nothing could be easier than to have made the specific objection in this case. They knew that the concluding sentence was not given as part of this particular instruction. They knew that this sen-

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tence had been given in another instruction. They therefore knew that there was a good reason for striking it out, and they knew that this reason was not stated to the jury. They had no reason to suppose that the judge had taken it upon himself to erase the sentence refused, and thus to deprive them of the means of presenting to this court or to the court below, on motion for a new trial, the written evidence of what their request was. It was not to be presumed that the judge in the hurry of the trial would undertake to re-write the instructions. If, then, there was reason to fear that the jury would be misled—if, by reason of the failure to state the reason of the modification, the charge was ambiguous, and by reason of such ambiguity the jury were liable to infer that in the opinion of the court the portion of the instruction refused was not law, why not request the desired explanation, and in case of refusal, state then and there the particular point of exception? It seems to us that every reason of the rule requiring such particularity fully applies, and that upon an exception which goes to the extent of denying the propriety of any modification whatever, it cannot be urged on appeal that a modification confessedly proper was not accompanied with an explanation which was never requested. The petition must be denied, and it is so ordered.



WILTSHIRE SAUNDERS, RESPONDENT, v. WILLIAM L
STEWART, APPELLANT.

ABSOLUTE CONVEYANCE MAY BE SHOWN MORTGAGE BY PAROL. The principle is that a conveyance absolute upon its face, whether of real or personal property, can in equity be shown by parol proof to be a mortgage, or to have been given only as security, or to have been obtained by fraud, mistake or undue influence, is too well settled throughout the United States to be disturbed.

PAROL PROOF TO SHOW EQUITY SUPERIOR TO DEED. The doctrine upon which parol proof is received to show a conveyance absolute in form to be a mortgage or security for a loan, is that such evidence is received not to contradict the instrument, but to prove an equity superior to it.

APPEAL from the District Court of the Second Judicial District, Washoe County.

It appears from the complaint in this action that in April, 1870, the plaintiff being the owner of two wagons and ten horses with their harness, worth \$1,400, for the purpose of securing M. C. Lake the payment of \$598.20, caused a bill of sale of the property to be executed to him by P. Belton, to whom plaintiff had previously conveyed the same also by way of security. Afterwards plaintiff and defendant entered into a parol contract, by which defendant agreed to pay the debt to Lake, take the property into his possession, engage in the freighting business, pay the expenses of the business out of the proceeds, and at the end of three months settle with plaintiff, and after receiving his wages and the money advanced with interest, deliver back the property or its value or equivalent, if he should sell or exchange any part thereof. In pursuance of the agreement, plaintiff procured Lake to make a bill of sale to defendant; the property was delivered; and defendant then engaged in the freighting business; but after the expiration of the three months refused to account to plaintiff, or settle with him or deliver up the property. On the contrary, he claimed, as shown by his answer, that he had purchased the property absolutely and paid for it full value; that plaintiff had nothing to do with his purchase from Lake; that Lake was represented to him as the full owner thereof; and that Lake executed to him a bill of sale, in which he undertook to warrant and defend the title of the property against the lawful claims of all persons whatsoever.

The referee, to whom the cause was submitted, found as a matter of fact that the bill of sale to defendant was an absolute one; but in his report says: "In arriving at this result I have ruled out as incompetent under the pleadings, all the testimony tending to show that the conveyance from plaintiff to Belton was intended as a mortgage or pledge, and that Lake took the property as a mortgage with notice of a right of redemption in plaintiff, the said testimony having been objected to by defendant on the hearing as incompetent and irrelevant."

The final judgment of the court below was that the property should be delivered over to the plaintiff; that the debt of plaintiff to defendant had been paid by the earnings of the property; and that defendant should pay all the costs.

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William Webster, for Appellant.

I. Parol evidence alone is not sufficient to authorize a court enter a decree declaring a deed or bill of sale a mortgage or security; fraud or mistake should be made to appear, or some making thereto, to authorize such decree. It is not claimed that defendant received the property in question as a security for money paid to Lake. A trust, it may be, is relied on by plaintiff; the question will then arise, is there a trust declared? A trust in personal property may be created by parol and so proved, but whenever there appears a writing in relation to the property claimed to be trust property, this writing must and will govern both in law and in equity, and parol evidence cannot be introduced to vary or contradict its terms. Adams' Equity, 146; Hill on Trustees, § 9. If plaintiff procured a bill of sale to be executed, is he not therefore estopped from showing a trust to have existed when such showing is only by parol?

II. Defendant had the right to sell or trade the property. How did he obtain such right unless he received it by reason of the bill of sale? That invested him with the title to the property. The plaintiff admits the title in defendant. Having thus admitted wherein consists the right of action of plaintiff against defendant. The pleader has stated that defendant had disregarded his trust, but no trust is charged in terms, neither will the facts warrant the conclusion that there was a trust.

Thomas E. Haydon, for Respondent.

I. The bills of sale from plaintiff to Belton, from him to Lake and from Lake to defendant, no matter what their terms or conditions, were in law only surplusage; for the same transaction could legally have taken place by mere delivery from hand to hand without security; and such bills of sale by all authority could have been shown to be mere security for debts operating as chattel mortgages. A deed absolute on its face may be shown by the circumstances to have been intended as a mortgage. *Runkle & Lichtenstein v. G. Lord*, 1 Nev. 125; *Feusier v. Sneath*, 3 Nev. 131; *Bingham v. Thompson*, 4 Nev. 232. Parol testimony is admissible to show

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that a bill of sale was intended as a mortgage. *Carlyon v. Lannan*, 4 Nev. 159; *White v. Sheldon*, 4 Nev. 293.

II. The judgment in this case is based on findings. There is no statement on appeal, and consequently the court cannot review any proceedings after the argument on motion for new trial. *Caldwell v. Greely*, 5 Nev. 262; *The Imperial Mining Co. ads. Barstow*, 5 Nev. 253. The court had power, this being a case of equity jurisdiction, to set aside the report of the referee on motion for new trial, and take up the testimony reported, find the facts and render a decree. *McHenry v. Moore & Murray*, 5 Cal. 92; *Cappe v. Bizzolara*, 19 Cal. 607; *Headley v. Ruel*, 2 Cal. 322; *Branger & Druar v. Chevalier*, 9 Cal. 353.

By the Court, WHITMAN, J.:

This action was brought to have a bill of sale of personal property absolute on its face declared a mortgage, and for an accounting. The referee to whom the case was sent found for appellant. The district court granted a rehearing, and upon the facts reported entered a decree for respondent. It is urged that the court erred both upon the facts and in the law.

The facts support the decree, and the law applied is too well settled in the United States to be disputed at this day. That an absolute conveyance, whether of real or personal property, can in equity be shown to be a mortgage, or to have been given only as security, by parol proof; that it was obtained or is vitiated by fraud, mistake or undue influence; or that the consideration upon which it depends is a loan, has been held by the federal court, and by the courts of last resort in New York, California, Iowa, Texas, Illinois, Mississippi, Wisconsin, Tennessee, Michigan, Connecticut, Pennsylvania, Indiana, North Carolina, Vermont, Ohio, Virginia, and so far as the digests indicate, by those of several other states, the citations from which it is impossible to verify, owing to the fragmentary condition of the library of this state. So also it has been held directly in *Carlyon v. Lannan*, 4 Nev. 159, while in other cases the general principle has been approved. The doctrine is, that such evidence is not received to contradict an instrument of writing, but to prove an equity superior thereto.

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The order and decree of the district court are correct, and are affirmed.

CYRUS T. WHEELER *et al.*, APPELLANTS, v. CHARLES SCHAD, RESPONDENT.

COVENANT TO BUILD DAM AND FLUME NOT RUNNING WITH MILL-SITE. V the owners of a mill-site and water privilege conveyed a portion thereof six days afterwards such owners and grantees entered into a contract to and keep in repair at joint expense a dam and flume for conducting water to their respective mills; and subsequently the mill and mill-site of the grantees were sold out on judgment against them: *Held*, that the contract of the grantees to contribute to keep the dam and flume in repair was not a covenant running with the mill-site, and that the purchaser at sheriff's sale was not by his purchase liable for any portion of such repairs.

DISCONNECTED MATTERS DO NOT FORM ONE TRANSACTION. Where the owner of a mill-site and water privilege conveyed a portion thereof, and afterwards such owners and grantees entered into an agreement to erect and keep in repair a dam and flume for conducting water to their mills; and it did not appear that the agreement was a part of the conveyance or contemplated at the time: that in no sense could the two papers be considered one instrument, connected together.

COVENANT RUNNING WITH LAND HOW CREATED. A covenant to run with land must relate to and concern the land; and if it imposes a burden, it can only be created where there is a privity of estate between the covenantor and covenantee.

COVENANT BINDING ON ASSIGNEE. To render a covenant binding on the assignee or the covenantor, it must not only be meant to bind his estate as well as the person, but the relation between the parties must be such as to render the intention effectual; that is, there must be privity between the covenantor and parties.

COVENANT RUNNING WITH LAND ONLY MADE IN FAVOR OF ONE INTEREST IN THE LAND. A covenant real is and can only be incident to land; it cannot pass independent of it; it adheres to and is maintained by it; it is in legal contemplation of the land; hence it follows that the person in whose favor it is made must have an interest in the land charged with it.

NO RECOVERY ON CONTRACT NOT COVERED BY PLEADINGS. In an action to recover half the cost of certain improvements made by plaintiff for the benefit of the parties, where the complaint based the assumpsit exclusively upon a contract by the terms of which it was claimed defendant was bound as assignee: *Held*, that no recovery could be had upon a direct personal promise.

PROBATA NOT TO GO BEYOND ALLEGATA. Proof is only admissible to establish the case made by the allegations of the pleading.

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PAROL ADOPTION OF WRITTEN CONTRACT—STATUTE OF LIMITATIONS. If a party adopt by mere parol promise the written contract of another, his obligation will be barred by the limitation prescribed for parol contracts.

APPEAL from the District Court of the Third Judicial District, Lyon County.

The facts are stated in the opinion of the court.

Sunderland & Wood, for Appellants.

I. Plaintiffs are entitled, under and by virtue of the agreement, to have a lien upon the defendant's interest in the dam and flume for one-half the amount expended by them in making the repairs.

II. The deed made June 5th, 1862, and the agreement made six days thereafter, are contemporaneous papers affecting the same property, and are to be taken and construed together.

III. The agreement constituted a covenant running with the land. 1 Parsons on Contracts, 199; *Mosman v. Wells*, 17 Wend. 136; *Watertown v. Connen*, 4 Paige Chy. 510; Taylor's L. & T. Sec. 437; 2 Sugden on Vendors, Chap. 14.

IV. The claim of plaintiffs is an obligation or liability, founded upon an instrument in writing, and therefore not barred by the statute of limitations as a parol contract. The statute does not require the instrument upon which a liability is founded to be signed by the party sought to be charged. *Sherwood v. Dunbar*, 6 Cal. 53; *Saunickson v. Brown*, 5 Cal. 57; *Neighboerrs v. Simmons*, 2 Blackf. 75; *Raymon v. Simison*, 4 Blackf. 85.

V. Defendant is personally liable. This is a proceeding in equity, and if a liability exists from defendant to plaintiffs, arising out of the indebtedness alleged in their complaint, relief should be granted. When a court of equity has acquired jurisdiction, and has the whole merits before it, it will proceed and do complete justice between the parties.

Williams & Bixler, for Respondent.

I. This action does not lie for want of privity, either of contract or of estate, between the parties. 2 Wash. Real Prop. 15, 16;

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Hurd v. Curtis, 19 Pick. 462; *Morse v. Aldrich*, 19 Pick. 454; *Plymouth v. Carver*, 16 Pick. 185; *Parish v. Whitney*, 3 Gray, 516.

II. The covenant in this case does not run with the land or bind the assignee. *Thompson v. Rose*, 8 Cow. 269; *Laurette v. Anderson*, 6 Cow. 307; 4 Comst. 136; 4 Seld. 467.

III. The action is based solely upon the written contract, and unless it creates a lien no cause of action is found in the complaint. It does not create a lien, and none can be raised by implication. If the parties desired to create a lien, it was their duty to have expressed their intention so to do in the contract itself. *Clark v. Southwick*, 1 Curtis, 298; *Taylor v. Baldwin*, 10 Barb. 591.

IV. If the action could be supported on equitable principles outside of the covenant, and were so treated, then it is barred by the statute of limitations because it did not accrue within two years.

V. At the time the repairs were made, defendant was mortgagor in possession, and as such he was not liable on the covenants of the mortgagor, though running with the land. *Johnson v. Sherman*, 15 Cal. 292; *Robinson v. Russell*, 24 Cal. 473.

By the Court, LEWIS, C. J. :

On the fifth day of June, A. D. 1862, M. S. Hurd, Ferdinand Dunker and Peter Bossell, being the owners and in possession of certain mill-site and water privilege, regularly conveyed to Charles Doscher, Charles Itgen, Charles D. McWilliams and William Duval a portion thereof, together with the water privilege connected therewith. The grantees entered into possession and erected a quartz mill on the premises thus conveyed. The stream was first conducted to the mill of Hurd and associates, and thence to that of their grantees. On the eleventh day of the same month, the respective parties entered into an agreement which, after reciting the necessity of constructing a dam across the river and a flume to conduct the water to their several mills, provided that the dam and flume should be constructed at their joint expense, Hurd and associates, however, agreeing to pay five hundred dollars more than one-half the cost, and the other parties the balance; the d

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and flume, when completed, to be owned and enjoyed jointly in equal shares. It was also agreed that they should be kept in good order and repair at the joint and equal expense of the respective parties. Some time after the construction of these works, Wheeler succeeded to the interest of Bossell, and he, together with Hurd and Dunker, continued in the ownership and remained in possession of the first mill, known as the Eureka.

Doscher and his associates having mortgaged their mill some time between January and March, 1868, put the assignee of the mortgage (defendant) in possession, who continued to hold the property under the mortgage until he obtained the absolute title by virtue of foreclosure and sale under his mortgage, which occurred in October, A. D. 1868. Early in the year 1868, while the defendant was in possession under the mortgage, the dam and flume were damaged to such an extent that it became necessary to make extensive repairs upon them. Before proceeding with the work, the plaintiffs notified the defendant of their damaged condition, and requested him to unite with them in making the proper repairs. The defendant agreed that the work should proceed, and requested the plaintiff Wheeler to superintend it and "take charge of the workmen." The repairs were made in due time, at an expense of three thousand five hundred dollars, one-half of which is now sought to be recovered. Judgment for defendant; plaintiffs appeal; and it is argued on their behalf: first, that the defendant is liable on the agreement entered into between the defendant's grantors and the plaintiffs; and secondly, if not, that he is so upon his own agreement with the plaintiffs, authorizing the work to be done.

To maintain the first point, it is contended that the deed of conveyance of the mill-site to the grantors of the defendant, and the agreement referred to, should be held to be one instrument; that the stipulations of the latter should be engrafted upon the deed and held to be covenants running with the land. But nothing is clearer than that the two instruments are utterly disconnected, as completely independent of each other as they possibly could be. The deed was executed on the fifth day of June, at which time it does not appear that there was any thought of an agreement to

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construct or keep in repair any dam or flume. There is no evidence that such a project was in contemplation even by any of the parties, much less that any agreement of this character was in view. It was not, in fact, executed until six days afterwards, and there can be no presumption other than that it was not contemplated until such time. Had it entered into the transaction; had it been understood between the parties at the time of the conveyance that such contract should be executed, there might be some ground for the claim that the agreement and deed constituted but one transaction, and therefore should be construed as one instrument; but unfortunately for the appellants, there is no such showing in the case. If, in fact, the agreement did not enter into the conveyance, or was not contemplated at the time, it is of no consequence how soon afterwards it may have been executed; a day or an hour would as completely separate the instruments and make them independent of each other, as a year. It is impossible, under the evidence in this case, to merge the deed and agreement into one instrument, and construe them as if executed simultaneously.

Unless they constituted one instrument or transaction, it cannot be claimed that the covenants of the agreement run with the land so as to charge the grantee of the covenantor. To make a covenant run with the land, it is necessary, first, that it should relate to and concern the land; and secondly, a covenant imposing a burden on the land can only be created where there is privity of estate between the covenantor and covenantee. Whether a covenant for the benefit of land can be created where there is no privity is sometimes questioned by some authorities; but it was held in *Packenham* case, determined as early as the time of Edward III, that a stranger might covenant with the owner in such manner as to attach the benefit of a covenant to the land and have it run in favor of the assignees of the covenantee; and the rule there established has since been frequently recognized as law, although questioned by text writers, and the broad doctrine sought to be maintained that privity of estate is absolutely essential in all cases, to give one man a right of action against another upon a covenant, when there is no privity of contract.

Whether the rule announced in *Packenhams case* be law or not, is not necessary to determine here, for all the courts hold that the burden of a covenant can only be imposed upon land so as to run with it when there is privity of estate between the covenantor and covenantee. It was said by Lord Kenyon, in *Webb v. Russell*, 3 Term, 393, that "it is not sufficient that a covenant is concerning the land, but in order to make it run with the land there must be a privity of estate between the covenanting parties." That was the law long prior to the time of Kenyon, and has never been doubted, although perhaps cases may be found where an erroneous application of the rule has been made. To render a covenant binding on the assignee of the covenantor, it must therefore not only be meant to bind his estate as well as his person, but the relation between the parties must be such as to render the intention effectual—that is, there must be privity of estate between the covenanting parties. To constitute such relation, they must both have an interest in the land sought to be charged by the covenant. It is said their position must be such as would formerly have given rise to the relation of tenure. A covenant real is, and can only be, an incident to land. It cannot pass independent of it. It adheres to the land; is maintained by it, is in fact a legal parasite, created out of and deriving life from the land to which it adheres. It follows, that the person in whose favor a covenant is made must have an interest in the land charged with it; for he can only get the covenant through, and as an incident to, the land to which it is attached. Says Coke, 385, (a): "A seized of the Mannor of D, whereof a Chappell was parcell, a prior with the assent of his covent covenanteth by deed indented with A and his heires to celebrate divine service in his said Chappell weekly, for the lord of the said Mannor and his servants, &c. In this case the assignees shall have an action of covenant, albeit they are not named, for that the remedie by covenant doth runne with the land, & give damages to the partie grieved, and was in a manner appurtenant to the Mannor. But if the covenant had beene with a stranger to celebrate divine service in the Chappell of A, and his heires, there the assignee shall not have an action of covenant; for the covenant cannot be annexed to the Mannor because the

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covenantee was not seized of the Mannor." So it is manifest that an interest in the land sought to be charged with the covenant must exist at the time the covenant is made. It needs no argument to show that an interest acquired afterwards would not avail the covenantee.

Did the plaintiffs in this case have any estate in the land owned by the defendant at the time this agreement was entered into? It is not even claimed they had. Nor did the agreement itself create any such interest. There is no attempt in it to convey any estate to them, nor a word of grant in the whole instrument. It is a mere contract for the erection of a dam, which does not appear to be on the premises either of the plaintiffs or defendant, and a flume to conduct water to their respective mills, and to maintain them in good order. Suppose the grantors of the defendant had entered into an agreement binding themselves to build the dam and flume for the benefit of the plaintiffs, for a stipulated sum of money; will it be claimed that such an agreement could be held a covenant running with land owned by such grantors, and which was entirely distinct from that upon which the work was to be performed? We apprehend not. Where the distinction, as to its capacity to run with the land, between such a covenant and that entered into here, where instead of compensation in money the defendant's grantors were to receive a benefit from the improvement itself?

As the grantors had no estate in the land owned by the defendant when the agreement was entered into, but were mere strangers to it, the case comes directly within the rule announced by Lord Coke, and very uniformly followed both by the English and American courts since his time. *Webb v. Russell*, 3 Term, and *Stoke v. Russell*, Id.; *Hurd v. Curtis*, 19 Pick. 459; *Plymouth v. Carver*, 16 Pick. 183. See also an elaborate review of the question in 1 Smith's Leading Cases, note to *Spencer's Case*; 2 Washburn on Real Property, 16 Pick. 183.

The case of *Plymouth v. Carver* was of this character. The town granted certain land on condition that the grantees should become bound by bond to maintain a portion of the highway passing by such land, but did not reserve a right of entry in case

highway should be suffered to be out of repair; and the grantee gave a bond accordingly, by which he bound himself, his heirs, executors, administrators and assigns. It was held that the obligation in the bond was not a covenant running with the land; the court saying: "The plaintiffs claim to recover upon the writing declared upon as a covenant which runs with the land. But with what land is this covenant running? No right or estate in any land is conveyed by the covenantor to the inhabitants of the town. Nor did the town in their deed reserve any right of entry, or any interest whatever, in the land which they granted to Barnaby and Shurtleff. But on the contrary, the town conveyed the land on a condition that the grantees would give a bond that they would maintain the highway. The grantees gave a bond to that effect, and thereupon the estate vested in them absolutely. We think it very clear that the bond was a formal obligation of the obligors, not subjecting the land which the town had conveyed to them in any other way than any of the estate of the obligors might be liable to the performance of their personal covenants or obligations." There are cases in equity holding that covenants entered into touching or concerning land, but which are not such as will run with it, may be enforced against the assignee of the covenantor *who takes the land with notice of the covenant*. Such are the cases of *Whitman v. Gibson*, 9 Simon, and *Mann v. Stephens*, 15 Simon, 379. But in this case there is no showing that the mortgagee had notice of the covenants sought to be charged upon the land at the time the mortgage was executed, or that the defendant had such notice at the time he bought in the property at the foreclosure sale; therefore, if the cases referred to correctly declare the law, they do not control this case in the absence of the essential element of notice.

There being no privity of estate, or of contract between the parties, it only remains to determine whether the defendant is holden on his own promise made to the plaintiffs. First, the action is not based on any such promise or contract. The complaint is framed with reference exclusively to the written agreement, and upon that alone relief is sought. Nothing is charged in the complaint tending to charge the defendant with any personal obligation,

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except that the repairs were made with his knowledge. As the complaint does not allege any personal promise or contract on the part of the defendant, it would hardly be conformable to the rules of law to award relief upon the assumption of its existence. No personal promise or agreement by the defendant could properly be proven under the complaint; for proof is only admissible to establish the case made by the allegations of the pleading.

But again, if any such promise was made, it is undoubtedly barred by the statute of limitations, not being evidenced by writing. It cannot be said that the defendant adopted the written agreement as his own, and thereby bound himself to it, for it is not shown that he knew of its existence. But even if he knew of it, the only evidence of his obligation upon it was in parol, and therefore it cannot with any degree of reason be said that if he had directly adopted the contract by a parol promise, his obligation would not be barred by the limitation prescribed for parol contracts.

The judgment below must be affirmed.

REPORTS OF CASES

DETERMINED IN THE

PREME COURT

OF THE

STATE OF NEVADA,

JANUARY TERM, 1872.

L. ROGERS *et al.*, RESPONDENTS, *v.* MARTIN
COONEY, APPELLANT.

ON REQUISITE TO MAINTAIN TRESPASS. In an action of trespass, it is only necessary for the plaintiff to prove a rightful possession in fact; it is not incumbent on him to establish any title beyond that.

CLAIMS ANALOGOUS TO MINING CLAIMS. If land be valuable only for minerals which it may contain, such as land on which tailings have been deposited, and it is not claimed for any other purpose, the acquisition of a title to it is governed by the same rules ordinarily controlling principles to mining claims.

LAND VALUABLE ONLY FOR TAILINGS. Where a person entered upon land, upon which tailings were deposited, for the purpose of digging up, hauling them away and milling them, and caused a survey to be recorded, marked the boundaries with large posts firmly set in the corners and one in the center of one of the sides, and thereafter to work the claim and built a cabin on it, which was used for storing tools employed on the premises: *Held*, that he had a possession sufficient to maintain an action in trespass against an intruder entering within his boundaries.

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DISTINCTION BETWEEN POSSESSION OF MINING CLAIM AND POSSESSION OF FARMING LAND. The same acts which are required to enable a settler to obtain actual possession of pasture or agricultural land, so as to subject it to the purpose for which it is useful, are not demanded when the claim is only of mining ground.

FENCING NOT NECESSARY TO POSSESSION OF MINING CLAIM. Fencing a mining claim would serve no useful purpose except to mark its boundaries; and any other means which will accomplish that object will equally answer the requirements of the law as to the possession of such a claim.

TAILINGS REMOVED FROM LAND IN POSSESSION OF ANOTHER. Where a plaintiff was found to have the possession of certain land upon which tailings were deposited, and defendant to have intruded and removed a portion of such tailings: *Held*, that plaintiff's right to the tailings was coëxtensive with his right to the land.

ARGUMENTS ON APPEAL OUTSIDE OF RECORD. The Supreme Court will not consider questions argued before it, when the facts and proceedings upon which such arguments are based are not brought up in the record or properly presented.

APPEAL from the District Court of the Third Judicial District of Lyon County.

The claim taken up by the plaintiffs, John L. Rogers, Richard Trotter and John R. Rogers, consisted of a tract of land containing one hundred and twenty-two acres in Lyon County. The facts are stated in the opinion.

R. M. Clarke, for Appellant.

I. Plaintiffs cannot recover upon the weakness of defendant's rights; but must recover, if at all, upon the strength of their own. Unless the tailings sued for were the property of plaintiffs, judgment must go for defendant, because the defendant had reduced such tailings to his possession by gathering them up and hauling them away.

II. Plaintiffs have shown no paper title nor any possessory right to the land. They did not comply with the requirements of the possessory act; nor did their acts, independently of the statute, constitute a possessory right. *Sunol v. Hepburn*, 1 Cal. 26; *Kile v. Tubbs*, 23 Cal. 431; *Coryell v. Cain*, 16 Cal. 567; *Garrison v. Sampson*, 15 Cal. 95; 21 Cal. 454; 32 Cal. 15; *Sank v. Noyes*, 1 Nev. 68; 2 Nev. 280; *Staininger v. Andrews*, 4 Nev. 59; *Robinson v. The Imperial Silver Mining Co.* 5 Nev. 44.

III. Before deposited on the land, the tailings were personal property. Gathering them into piles severed them from the realty, reduced them to possession, and changed their character from real to personal property. Of course, this is only true as to the persons acquiring right at the severance. But as to such persons, there can be no more doubt about the ownership and right to remove, than in the case of growing trees felled and manufactured into wood. 11 Cushing, 11; 5 Nev. 81.

IV. In the progress of the suit the defendant⁴ violated the injunction, and thus put himself in contempt. For this contempt he was arrested and punished, and in the proceeding a receiver was appointed and put in charge of the tailings removed, pending the suit. And in this case, without amended or supplemental complaint or trial, the court adjudged the plaintiffs to own the tailings said to have been wrongfully removed, and ordered the receiver to deliver them into the possession of the plaintiffs. This also was error.

Ellis & King, for Respondents.

I. Plaintiffs have shown a good and valid appropriation by them of the premises and property in controversy, by having done such acts as confer a mining right upon them, according to the well recognized rules concerning appropriation of mining claims.

II. It is admitted the ground was valuable only for the tailings upon it, or in a qualified sense as a mining claim. Under such circumstances, what, more than plaintiffs did, could be required under the law to confer a mining right? It was not necessary to fence. *McFarland v. Culbertson*, 2 Nev. 282; *English v. Johnson*, 17 Cal. 107.

III. If plaintiffs acquired and had possession of the premises and property for mining purposes, as claimed by us, this is a full and complete answer to the position of defendant as to the severance and removal of the tailings. *Whitman Co. v. Baker et als.*, 3 Nev. 387.

IV. As to the proceedings on contempt and as to the receiver,

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there is not, nor does there purport to be, any account or history in the record.

By the Court, LEWIS, C. J.:

Trespass for entering upon a tract of land and removing there from certain tailings claimed by the respondents. The judgment below was for the plaintiffs, awarding to them eight hundred dollars damages, and enjoining the defendant from a repetition of the acts complained of. The learned judge below found that upon the twenty-first day of March, A. D. 1870, the plaintiffs entered upon the land in question, which is a long narrow tract, upon which the tailings were deposited; caused a survey thereof to be made and recorded, and marked the boundaries by red posts firmly set in the ground at each corner, and one in the center of the south boundary line; that continuously thereafter they have been engaged in digging up, hauling away, and milling the tailings deposited thereon; that in August, A. D. 1870, they built a small cabin within the boundaries designated, using it for storing the tools employed by them on the premises and for other purposes; that they had applied to the proper state authorities to purchase a portion of the land; deposited the consideration therefor, and also received from the Central Pacific Railroad Company a contract whereby it agreed to convey to them the residue as soon as it should receive a patent therefor from the government, the land being within a section granted to that corporation by the Act of Congress of July 1st, 1862. On the seventh day of December, the defendant entered upon the land and began to remove the tailings, and before the suit was brought had removed about two hundred tons, valued at four dollars a ton. Shortly after his entry upon the premises, he also made application to the state to purchase that portion of the land upon which the trespass was committed. Neither he, nor the plaintiff, however, had acquired any title thereto from the state at the time of trial. The claim which he made to the land, years before the time of this trespass, appears to have been abandoned, and is therefore of no weight in this case. The court finds, also, that the land in question was utterly useless, and of no value except for the tailings deposited on it.

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This is also admitted by the parties. No title to the tailings is claimed by either party, beyond that which may have been acquired by the attempts to obtain title to the land upon which they were located, or their actual reduction to possession, they having been brought down in the stream from the quartz mills above and deposited on the land in question by the water running over it, forming a stratum upon its surface and becoming a part of the soil itself. The question then is, which of these parties had the best right. As the trespass does not seem to have been committed on that portion of the land agreed to be conveyed by the Central Pacific Railroad to the plaintiffs, and as neither party appears to have acquired any title from the state to that portion upon which it was committed, what right or title the plaintiff acquired by means of this contract with the Central Pacific Railroad and from the state by the application to purchase, and the deposit of the purchase money may be left out of the case. Let us ascertain then, what right he had, independent of these facts.

It must be borne in mind throughout the case, that in an action of trespass it is only necessary for the plaintiff to prove a rightful possession in himself; it is not incumbent on him to establish any title beyond that. The right of property may be either in the government or a third person. In either case where the controversy is between persons neither of whom claims the real title, the question turns simply on the best right of possession. The plaintiff, therefore, in such action is only called upon to prove that the property was rightfully in his possession as against the defendant at the time of the acts complained of, and that the defendant committed the injury. Does the proof in this case bring the plaintiffs within the rule? It is argued not; that they had acquired no such possession of the land in question as to entitle them to its possession as against the defendant.

It is admitted by the parties, and so found by the court below, that the land in question is of no value except for the tailings, and that they are valuable only for the gold and silver which they contain. So it is manifest from the evidence that neither plaintiffs nor defendant claimed the land for any purpose except that of securing the tailings; in other words, it is claimed by them for mining

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purposes only. Although not a mining claim, within the meaning of the expression as generally used in this country, is so closely analogous to it, that the propriety of subjecting the acquisition and maintenance of the possession of it to the same rules governing the acquisition of the right of possession to a strict mining claim, at once suggests itself. The only value attached to the land results from the precious metals which may be obtained from it. What the difference how these metals may have been obtained makes there, so far as a case of this kind is concerned? It is difficult to see through a certain stratum of earth, which must be dug up and then through a certain milling process, as in case of any ordinary mineraliferous earth. If the land be valuable only for the metals it may contain, and it is claimed by neither party for any other purpose, the acquisition of title to it should manifestly be governed by the rules ordinarily controlling the acquisition of title or possession to mining claims. We do not pretend to hold that the land here in question to be mineral land, but only that it is so closely analogous thereto, that the laws controlling the possession of the one should also govern the other. Under those rules the plaintiff has an undoubted possession, sufficient to enable them to maintain their title against any person entering within their boundaries, such as would show a better right. It is the suggestion of the court, and the clearest reason, that the same acts which are required to enable a settler to obtain actual possession of pasture or agricultural land, should not be demanded where the claim is only on mineral ground. In the first case, fencing is often indispensable to completely subject the land to the purposes for which alone it is valuable. Hence it is generally held that such acts must be performed to bring it within this rule of utilization. But fencing a mining claim would be an utterly useless act. It would in no wise increase its value, and would often be a mere incumbrance; it would in no remotest manner further the purpose for which alone the land is valuable. The rule requiring fencing and improvement is based on utility, requiring the land to be subjected to the purposes for which it is useful; but the reason for requiring such improvement in respect to agricultural lands has no application to a mining claim, nor to land like this, which is valuable only for mining purposes.

It has therefore been uniformly held that fencing is not necessary ; that to do so could serve no purpose except to mark the boundaries ; and any other means which will accomplish that object will equally answer the requirements of the law. Thus in *English v. Johnson*, 17 Cal. 107, the court decided that possession taken of a mining claim without reference to mining rules was sufficient, as against one entering by no better title, to maintain an action ; and that such possession need not be evidenced by actual enclosure, but if the claim be included within distinct, visible and notorious boundaries, and if a portion of it is worked within such boundaries, it is sufficient against one entering without title. So it was held that going on land to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting or preparing to extract minerals from it, as starting a tunnel a considerable distance off to run into the claim is a sufficient possession of the claim. Say the court : " The question arises as to the extent of the possession of the first taker, and the rules which determine this question. In mining claims, we require no other acts as evidence of possession than those usually exercised by the owners of such claims. A miner is not expected to reside upon his claim, nor to build upon it, nor to cultivate the ground, nor to enclose it. The claim is usually of a small strip of land compared with the extent of the ground generally taken up for agricultural purposes. Its only value is in working it and extracting minerals. Going on the land to work it, or even work done in proximity, or preparing to extract minerals from it, as for example, starting a tunnel a considerable distance off to run into the claim, would be a possession of the claim within the meaning of the rule. * * * But we think where a claim is distinctly defined by physical marks that possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on, or of, a part, and though the party does not enter in accordance with mining rules or under a paper title. The rule which applies to agricultural land, and holds to a more strict interpretation of a *possessio pedis*, does not apply to such a case. Inclosure, if not impossible, besides being probably hurtful to other interests and rights, would be wholly useless. It would give no greater or better advertisement of the

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extent of the claim than those physical signs, nor give any better protection to the premises against intrusion, or show any higher power of dominion." This doctrine was affirmed in *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 199, and again in *Hess v. Winter*, 30 Cal. 349, and is clearly the doctrine always recognized in this state.

It does not seem to be questioned but the plaintiffs had designated the boundaries of this claim by distinct physical marks. They had placed large posts painted with a red color at its several corners, and also an additional one in the centre of the south line. But as there appears to be no question in the case as to the fact that the boundaries were marked by distinct visible monuments, it is unnecessary to discuss the question further. Their possession was therefore, all that was required, and was sufficient to enable them to hold and protect it. With this view of the case it is unnecessary to decide what right or title, if any, the plaintiff acquired by means of the contract with the railroad company. Nor can it be claimed that the defendant acquired any right or title to the tailings gathered together, or, as it is claimed, severed from the land by him whilst the plaintiffs were in the rightful possession of the premises, for their right to the tailings was coëxtensive with their right to the land. And as we have shown they had such right and possession at the time of the entry of defendant, they had an equal right to and possession of the tailings.

The only remaining question argued in this court arises out of the action of the court below in placing a receiver in possession of a certain quantity of the tailings, removed in violation of a restraining order, and subsequently adjudging the title to the same to be in the plaintiffs. None of the proceedings had in the appointment of the receiver, and none of the evidence touching the removal of the property in violation of the order of court, appear in the record. Under such circumstances this court does not feel warranted in attempting a review of the action of the court below, as it would be compelled to do so with no satisfactory information of the facts upon which its action was taken. However, if we were allowed to act upon the facts as related in the brief of counsel for appellants, we should not hesitate in holding that the court below was fully

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justified and warranted by the law in summarily restoring all property to the plaintiff which it was found upon the final hearing belonged to him, and which had been removed or taken possession of by the defendant in contempt of an order against him enjoining any such interference with it.

Judgment below must be affirmed, and it is so ordered.

JOHN EHRHARDT, RESPONDENT, v. A. CURRY, APPELLANT.

CLERICAL ERROR IN JUDGMENT MUST BE PRESENTED BELOW. Where on appeal it appeared that there was a clerical error or mistake to the extent of five dollars in a judgment, and the attention of the court below had not been called to it: *Held*, that the point could not be made in the appellate court.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action on two checks, one for \$735.90 and the other for \$102.00, dated Carson City, May 15th, 1871, and drawn on Wells, Fargo & Co. by defendant in favor of plaintiff. Wells, Fargo & Co. refused to pay for want of funds of defendant. The defense was want of consideration. There was a judgment for plaintiff for the amount of the checks and interest; but it seems that the judgment was entered for \$5 too much. The specifications of error in the statement on motion for new trial were to the effect that the evidence was insufficient to show that defendant was liable on the checks, and that it appeared that the checks were given for work done by plaintiff in the erection of the United States branch mint at Carson City, and that such work was done for the United States Government and not for defendant.

In the judgment, the court recited that it found that defendant made and delivered the checks, as set out in the complaint; that they were given for a good and valuable consideration; that plaintiff was the owner and holder thereof; that there was due and payable to him from defendant thereon the amount of said checks and inter-

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est ; and then followed the judgment that plaintiff recover of defendant the sum of \$872.51 and costs.

T. D. Edwards and *Thomas Wells*, for Appellant.

I. The findings of fact do not justify any conclusions of law favorable to the plaintiff, nor do they show that plaintiff was legally entitled to any judgment against defendant. The court did not find that the facts ever transpired, contingent upon which plaintiff had a right to sue upon the checks or either of them.

II. The court found no conclusion of law ; hence the judgment is unauthorized and voidable.

III. The judgment shows upon its face that it is in excess of the amount then due from defendant to plaintiff on the checks submitted upon, if anything was due. The checks and interest amounted \$867.47, and not \$872.51 for which judgment was entered. 14 Cal. 240 ; 3 Cal. 396.

Robert M. Clarke, for Respondent.

By the Court, GARBER, J. :

In this case the only assignment which is even plausible, is that the judgment is for five dollars more than the sum prayed for and shown to be due by the findings and complaint. This was clearly a clerical error, or the result of a mistake in computing the interest. The attention of the court below should have been called to the mistake, and a motion there made to correct it. Under the circumstances, the point cannot be made in this court. 5 Cal. 417 ; 20 N. Y. 498.

The judgment is affirmed, with costs.

In the Matter of the Estate of Henry Sticknoth.

**IN THE MATTER OF THE ESTATE OF HENRY STICK-
NOTH, DECEASED. H. H. BENCE, PUBLIC ADMINIS-
TRATOR, APPELLANT.**

INSTITUTIONALITY OF STATUTE CONCERNING HENRY STICKNOTH'S WILL. Where, under the act of March 4th, 1871, (Stats. 1871, 129) the unattested paper therein referred to was admitted to probate as the will of Henry Sticknoth, deceased: *Held*, that such statute was not unconstitutional, and such admission to probate not error.

PRESUMPTIONS IN FAVOR OF PROPER JUDICIAL ACTION. Where the unattested paper purporting to be the will of Henry Sticknoth, deceased, was admitted to probate in accordance with the provisions of the act of March 4th, 1871, relating thereto, (Stats. 1871, 129): *Held*, that the presumptions were in favor of the validity of the action of the legislature and of the court below; that, as nothing appeared to the contrary, it should be assumed the deceased left no heirs, and that the state alone had an interest in preventing the probate of such will.

STATUTE VALIDATING UNATTESTED WILL. The passage of a statute, which validates a will by dispensing with the requirement of attesting witnesses, is not the exercise of judicial power; and such a statute is not for any such reason unconstitutional.

STATUTE WAIVING ESCHEAT NOT UNCONSTITUTIONAL. The state, through the legislature, may waive the right to insist upon a technical informality in the execution of a will as against the just and equitable claims of the legatee; in other words, it may waive its rights to an escheat by ordering that an unattested will may be admitted to probate; and there is nothing in the constitutional provision concerning the school fund, Art. XI, Sec. 3, to prevent it.

STATUTE PREVENTING ESCHEAT NO TRANSFER FROM SCHOOL FUND. The statute providing for the admission to probate of the unattested will of Henry Sticknoth, deceased, (Stats. 1871, 129): *Held*, not to transfer to another fund, besides the school fund, the proceeds of an escheated estate.

CONSTITUTIONAL PROVISION AS TO ESCHEATS. The constitution does not in terms vest in the school fund the title to escheats; it enjoins the application of certain resources to a specified purpose coupled with a prohibition against their diversion to other uses; but it does not prevent the legislature from determining what estates shall escheat, or from asserting or waiving a claim to derelict goods.

SUBJECT OF ATTESTING WITNESSES TO WILL. Attesting witnesses to a will are not required for the purpose of protecting the contingent and possible right of property in the state by way of escheat; but to prevent the setting up of fictitious wills against heirs and representatives.

ONLY INTERESTED PERSON CAN COMPLAIN OF VIOLATION OF VESTED RIGHTS. Courts will not declare a statute void as infringing vested rights, except at the instance of a party whose rights are violated or impaired.

In the Matter of the Estate of Henry Sticknoth.

PUBLIC ADMINISTRATOR HAS NO VESTED RIGHTS IN ESCHEATED ESTATES. Where a person owning an estate died without heirs, and leaving a paper purporting to be a will, but unattested; and the legislature passed an act to validate such paper as a will, and thereby in effect waived an escheat: *Held*, that the public administrator had no vested right to the estate or its administration, and no right to be heard urging that the act was unconstitutional.

STATUTE WAIVING ESCHEAT NOT REGULATION OF PRACTICE. The statute providing for the admission to probate of the unattested will of Henry Sticknoth (Stats. 1871, 129) is not a regulation of the practice of a court of justice and does not, in that respect, violate the constitution. Art. IV, Sec. 20.

STATUTE WAVING ESCHEAT NOT OPPOSED TO CONSTITUTION, ART. IV, SECTION 20. The statute providing for the admission to probate of the unattested will of Henry Sticknoth (Stats. 1871, 129) is not objectionable as a special act in a case where a general law could be made applicable.

OBJECTION OF WANT OF SEAL TO WILL. Where it was urged in the Supreme Court for the first time that a will, admitted to probate in the court below, was valid for want of a seal; and the record did not purport to contain a copy of the original will or a fac-simile thereof, but only a translation: *Held*, that objection could not be successfully urged.

SEAL TO WILL NEED NOT BE MENTIONED, NOR REMAIN. Though the statute contains an absurd and novel requirement that a will shall be sealed, (Stats. 1862, 58, Sec. 3) it is unnecessary to make mention of the seal in the instrument; nor is it necessary, if by the act of sealing the condition imposed by the statute is performed, that the seal should remain.

APPEAL from the District Court of the Second Judicial District of Ormsby County.

Henry Sticknoth died on February 10th, 1869, at Empire City, in Ormsby County, leaving about \$4,000 in gold coin, and a paper written six days previously in the German language, which he intended to be his last will and testament, and which he delivered to Seibo Muntinga, the person intended under the name of Siboto to be his legatee. The translation of the paper given in the opinion of the court, and which was used in the court below and as such admitted to probate, is evidently an attempt to give it word for word in English as it was in German, with the result of making bad English out of what was good German.

It seems that Seibo Muntinga made two separate attempts to have the paper admitted to probate, one before and one after the passage of the act of March 4th, 1871, given in the dissenting opinion of Justice Whitman. Both these attempts failed, the first

In the Matter of the Estate of Henry Sticknoth.

because the court held the paper not to be a will, and the second because it appeared that Muntinga had previously transferred all his interest in the estate to Samuel A. Mathews. These facts, however, were not made part of the record on appeal. On March 22d, 1871, Samuel A. Mathews, the assignee of Muntinga, filed his petition to have the paper admitted to probate as the will of Henry Sticknoth. H. H. Bence, the public administrator of Ormsby County, then in charge of the estate, objected to and contested the proceedings. It was he who took this appeal from the order admitting the will to probate.

Robert M. Clarke, for Appellant.

I. The act of March 4th, 1871, is special in a case where a general law could be made applicable. It admits a paper to probate as a will which had previously been excluded by the court. It makes an act valid which before was void. It suspends a general law in favor of a particular individual. It creates a right and vests it in the devisee, which until then had no existence. It suspends the statute of limitations, and gives a right of action which, if it ever had an existence, was barred by time. It defeats rights to the estate of Sticknoth, which were vested in his heirs or in the State, by granting the estate to a person who had no legal or equitable rights whatever therein. In each of which particulars it is an assumption of power wholly unwarranted by constitutional law. It is forbidden for the two reasons, either sufficient — 1st, That it is special. 2d. That it is judicial. See Cooley's Const. Limitations, 90-97 ; Sedgwick's Statutory & Const. Con. ; 19 Ill. 382 ; 16 Penn. 266 ; 2 Ark. 284 ; 3 Vt. 507 ; 10 N. Y. 374 ; 5 Pick. 64 ; 11 Penn. St. 494 ; 39 Penn. St. 137 ; 43 Penn. St. 512.

II. The court erred in admitting the paper to probate as the will of Henry Sticknoth, because the same was not sealed by the testator. No will is valid unless "sealed with the testator's seal." (Stats. 1862, 58, Sec. 3.) The act of March 4th, 1871, in no manner cures the omission to "seal."

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Thomas Wells, also for Appellant.

The act of 1871 does not dispense with *testate seal*; the act of 1862 requires testate seal to *every* written will; *ergo* the act of 1871 does not repeal that "part" of the act of 1862, requiring the seal of the testator, and the will is as invalid now as it ever was, admitting *pro re rata* the power of the legislature to legalize an invalid will.

This it seems to us disposes of the whole case, inasmuch as the application is not made by the party who by the act of 1871 is authorized to apply for the probate of the document in question, and the application is contested by a proper contestant—the public administrator of the proper county, who is the administrator of the estate of said deceased—on the ground *inter alia* that said document is not properly executed, and never was a will, and that the act of the legislature attempting as claimed to legalize it, is unconstitutional, and therefore void. But it may prove interesting, if not instructive, to notice some additional points and authorities pertinent to this case.

I. The constitution, Art. IV, Secs. 20 and 21, provides that every law regulating the practice of courts of justice in this state shall be general, and of uniform operation throughout the state. The act of 1871 is special, and regulates, though to a limited extent, the practice in a court of justice of original jurisdiction, and in this the appellate court of last resort of the state.

II. Again, the act divests a vested right, and therefore is unconstitutional. As the deceased had no heirs, the state of Nevada by escheat had a vested right in the estate. The legislature cannot divest a vested right. The moment Henry Sticknoth died without a will which, under then existing laws, could be legally probated, his heirs, if any, and if none the state, succeeded in vested right to his estate, which right could not be impaired by legislative act. 30 Cal. 138; 1 Kent. 511.

William Patterson, also for Appellant.

In the Matter of the Estate of Henry Sticknoth.

T. W. W. Davies, for Samuel A. Mathews, Respondent.

I. The legislature violated no provision of the constitution in passing the act of March 4th, 1871; such act, although to some extent special, not being in a case in which special legislation is prohibited, and being a case in which a general law could not be made applicable. The power of the legislature to pass remedial statutes and "healing acts," is not now questioned by any well considered authority. *Syracuse City Bank v. Davis*, 16 Barb. 18; *Underwood v. Lilly*, 10 Serg. & Rawle, 101; 16 Serg. & Rawle, 35; 7 Watts, 300; 20 Wend. 365; 17 S. & R. 66; 2 Peters, 627; Cooley's Const. Limitations, 370; Sedg. on Con. & Stat. Law, Sections 152, 171, 201, 677; 1 Kent, 455.

II. The court will endeavor to give the act in question such a meaning as will carry out the manifest intention of the legislature. It endeavors to settle no controversy; is no assumption of judicial power; and as is manifest from reading it, it simply proposes to relieve against technical irregularities in the execution of the will, to the extent of permitting the claimant to offer the will for probate, and authorizing the court to receive and consider the same. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature. The act was intended to waive any and all technical defects and irregularities in the execution of the paper. It is a deed of relinquishment on the part of the state, and an qualified waiver as to such defects and irregularities.

III. The use and necessity of a seal has been, for a long time, done away with; and it would be in the highest degree unjust to declare this act inoperative to afford the relief intended, for the reason that no seal was affixed to the signature of the testator, in direct opposition to the paramount will of the legislature, apparent upon the face of the act.

IV. If any party had any right to come in and resist the admission of the paper to probate as a will, the state only had that right, the reasonable and legitimate presumption being that there were no claimants to the estate. The state, however, had no vested right

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in the absence of a decree declaring an escheat; and when the state waived the defects in the execution, and offered and authorized the claimant an opportunity to establish, if he could, the justness of his claim, certainly the public administrator of Ormsby County could not object to such a waiver on the part of the state.

Wilkinson v. Leland, 2 Peters, 662; *Gibson v. Mason*, 5 Nev. 311; *Clarke v. Irwin*, 5 Nev. 111; 2 Y. & J. 196; Cowp. 382; 3 Dow, 15; Dwarris, 632; 2 Ohio S. R. N. S. 431; 3 Coms. 479; 8 Md. 88; 9 Johns. 147; 2 Paige, 217; Douglas, 702; 2 Sch. & Sef. 5; Story's Eq. Jurisprudence, § 753, *et seq.*; Sedgwick on Con. and St. Law, 359; 2 Cal. 595; 6 Cal. 462; 22 Cal. 95; 26 Cal. 387; 24 Cal. 480; 32 Cal. 241.

V. The statute of limitations could not run against this claim to the said estate until after the passage of the act, for the reason that, until relieved by the act in question, the claimant had no legal right to present the will for probate. 3 Parsons on Contracts, 92 *et seq.*, and cases there cited in notes; 17 Cal. 547; 30 Cal. 138.

M. S. Bonnifield, also for Respondent.

By the Court, GARBER, J.:

The only question presented by the record is, whether the court below erred in admitting to probate the paper presented as the will of the deceased, for the reason that said paper was not properly attested.

The presumptions in favor of the correctness of the action of the court below concur with the presumptions in favor of the validity of legislative action, in authorizing us to assume that the deceased left no heirs or distributees capable of taking; and that, consequently, the state of Nevada alone was interested in preventing the probate. 16 Gray, 422; 16 Pick. 96.

When the statute was enacted, it was undetermined whether the estate would vest in the state, or whether capable heirs would appear. It was also questionable whether the paper was, in all other respects than the absence of attesting witnesses, the duly executed will of the deceased.

The object of the legislature was to waive, so far as the sta

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med, the technical objection that the will was unattested, by all the rights of any heirs who might appear, and saving serious claims of the state. The intention was to exercise of election with which the state was invested, accordingly as, when ascertained, should render it inequitable for her, merely technical claim, or proper for her to oppose the intent of a fictitious bequest.

question is not, whether all the provisions of this statute are : whether it is constitutional in so far as it validates the dispensing with the requirement of attesting witnesses. In : the statute is not unconstitutional, as encroaching upon al functions. This is not the exercise of judicial power ; e, the state (being the only party in interest except the ould, in this way, consent to or stipulate for whatever decision was deemed advisable. 26 Cal. 135 ; 17 Cal. Wis. 501 ; Laws of Wis. Ch. 64, A. D. 1866.

se does not call upon us to decide, whether heirs of the had any such vested right to the proceeds of the estate, prevent the legislature from dispensing, by a retrospective ith a mere formality in the mode of executing the will, ance of which formality it might have made immaterial law. Cooley Const. Limitations, 369 *et seq.* ; *Dentzell* , 30 Cal. 144 ; 103 Mass. 408. However this may be, , I think, that there was no such vested interest in the al fund or its beneficiaries, and that there is nothing of Art. XI of our constitution to prevent the legis- n waiving the right to insist upon a technical informality cution of the will, as against the just and equitable claims gatee. This estate consists solely of personal property, a technical sense never escheats. But, admitting that, ing the constitution in the light of previous legislation, escheated estate can be held to embrace the movables as e the immovables of an intestate dying without husband, ndred ; still this statute does not transfer to another fund eds of an escheated estate. It is rather the prevention ate of an unjust escheat to the state. The constitution in terms, vest in the school fund the title to escheats. It

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is simply an injunction upon the legislature to apply certain ~~resources~~ sources to a specified purpose, coupled with a prohibition against ~~sources~~ their diversion to other uses. If any vested right had been created ~~by~~ by solemnly pledging these estates to educational purposes, it would ~~have~~ have been a waste of words to annex the prohibition.

Even supposing that a vested right was intended to be created ~~by~~ by the pledge of these estates, it cannot be admitted that it was ~~a~~ a vested right to do wrong, or that this constitutional provision ~~was~~ was designed to protect any claim which it would be unjust or inequitable ~~to~~ to insist upon. Cooley, 378. It was not designed to take away from the legislature the power to determine what estates should escheat, or the election to assert or waive a claim to derelict goods. 2 B. Mon. 394-401; but to provide that, when such property does escheat, it shall be applied to certain uses. I suppose no one would deny to the legislature the power, by a prospective statute, to dispense with all formalities in the execution of wills, or to abolish escheats altogether. The absence of any specific provision, restricting the legislative power and discretion in this respect, fortifies the conclusion that the framers of the constitution did not intend to compel the state to become the involuntary and tortious recipient of funds rightfully belonging to others, but only to prohibit her from diverting to other than the designated uses such funds as, in the exercise of this prerogative, she actually obtains from the specified sources. Escheated estates go to the state simply because no other owner can be found—because no one man has a better right to them than any other man, nor so good a right as the state, the ultimate heir in trust for all the people. Attesting witnesses to a will were not required in order to protect this contingent and possible right of property in the state, but to prevent the setting up of fictitious wills against heirs and representatives. So long as the state has both the legal and beneficial title, no injustice is likely to happen; for the state has the power, always liberally exercised, to relinquish the claim. I find no warrant in the language of the constitution for a construction which would practically annihilate so necessary and useful a power. On the contrary, what must have been the intention of its framers fully effectuated by dedicating to educational purposes all the ~~at~~ at

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would otherwise have gone into the general state fund from escheated estates. That this ought to be the law, I think, is obvious. That it is so, I believe, all the authorities concur. In *The State v. Tilghman*, 14 Iowa, 474, under constitutional provisions substantially identical with ours, both as to the right of the educational fund and the prohibitions against special legislation, this very question arose and was decided. The court there say: "The defect of the argument is, that it takes for granted that the estate fell within the law of escheat, whereas this was the very question that was being controverted when the legislature passed the act aforesaid. Neither the title nor the proceeds of the property had as yet vested in the state, and the legislature may have deemed it a doubtful question whether it ever would be held to be escheated property; and if it should be so held, it would probably work injustice to innocent parties. Hence it was thought proper, as an act of justice * * * as well as of prudence in avoiding the hazards of much costs, to make the disposition of the controversy which it did. Concerning its constitutional competency to do so, we have very little doubt under the circumstances of this case." That is, the state might relinquish to the legatee all her interest in the property. And, if she could do this directly, she could attain the same result indirectly, by declining to insist upon or by taking away a technical defense to the probate of the will. This is what our statute has done; and this the legislature, the state alone having an interest in preventing the probate, might do. 4 Zab., N. J. 575.

In Ohio, by a statute enacted in 1847, it was provided that escheated property should be applied to the benefit of the state agricultural fund. In 1853 a statute was enacted applying such property to the exclusive support of common schools. In January, 1852, a bastard died intestate, leaving personal property, which was claimed on the one hand by legitimate children of his mother, and by the agricultural society of the state on the other hand. The bastard had survived his mother, and therefore, according to the construction theretofore placed upon a statute of 1831, his estate could not pass to the maternal line. The statute of 1853 above mentioned was passed while the estate of the bastard was in course

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of settlement, and by one of its provisions prevented any escheat to the state, and gave the estate to the children of the bastard mother. P. C. "The right to distribution was a vested right, if it had belonged to a private person, could not have been impaired by subsequent legislation. In such case the distribution must have been made according to the law in force when the right accrued but it belonged to the state, and she had unlimited control over her own interests. The whole effect of the statute was to operate a relinquishment of an interest then existing, and to create a capacity in others to take it." It was further held unnecessary to decide whether the act of 1847 created a vested interest in the agricultural fund, so as to invalidate the subsequent grant to the school fund. On this point the court say: "Before either fund could be replenished, escheated property must exist. Being merely passive instrumentalities, it was within the power of the legislature to take it from the one and give it to the other; or to do what we think has been done, take it from both and give it to those better entitled by relinquishing the right of the state to the escheat. When property is found undoubtedly escheated, it will be in time to decide which of these funds can make the best claim to it." 4 Ohio St. 361; See also 8 Ired. Eq. 262; 31 Ill. 68.

The constitution of Maryland provided that the legislature should not use or appropriate certain taxes to any purpose, except as specified. Pending a suit against a collector of such taxes and sureties, an act was passed releasing the defendants from liability for the failure of the principal to pay over the taxes collected from him. It was objected, as here, that the act was void, because of a violation of the provision of the constitution fixing the destination of the sum in litigation. P. C.: "We regard this act of assembly as a mere release of claim on these bonds, and not as an appropriation or use of the taxes levied to pay the public debt of the state within the prohibition of the constitution. That instrument did not, by the clause relied upon, intend to deny to the legislature the power to compromise and release claims of the state against its citizens, when exercised, we must suppose there was sufficient reason for it." 15 Md. 205. By the common law, as held in the Kentucky case above cited, no meritorious or indefeasible right to this prop-

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ever vested in the public administrator. He would hold the intestate's property in trust for the state, the ultimate distributee, and not for his own use or benefit. Our statute of distributions affirms this principle of the common law. The public administrator alone has set up the unconstitutionality of this statute. It is well settled that courts will not declare a statute void, as infringing upon vested rights, except at the instance of a party whose rights are violated or impaired. I cannot see how this statute, so far as it has been acted upon, affects any vested right of the public administrator, or that he has any right to insist upon an escheat which the state has seen fit to relinquish. •

It is argued that this is a special statute and therefore void, for two reasons : first, as regulating the practice of courts of justice ; and second, because a general law could be made applicable. The statute is not a regulation of practice : the practice of the probate court is not altered by it. It primarily affects the right— incidentally, if at all, the remedy. It is a provision as to what shall constitute a valid will, rather than a regulation of the course of procedure by which the probate of the will may be obtained, or the mode in which the rights created are to be administered.

As to the second objection, whatever might be my individual opinion, I cannot distinguish this case from the case of *Hess v. Pegg, ante*. Whether any statute which would have been judicially noticed at common law can be regarded as special under our constitution, and whether this statute would be so noticed, we do not decide. Vid. 24 Ind. 34.

By the statute of 1862 it was thoughtlessly enacted, that no will should be valid unless sealed with the seal of the testator. A noncompliance with this useless requirement is urged in this court — no such objection having been made below — as a reason for reversing the judgment. The will is not before us, and consequently we do not know that the fact is as alleged. The transcript does not purport to contain a copy of the original will, or a *fac simile* thereof; but only a translation, as follows : “ Empire the 4 Feby 69. Sibbo shall my money have when I buried am and my coat and my overalls. This write I that it him nobody take can Henrich Sticknoth.” Even if we could infer from this, that the orig-

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inal, when filed, was without a seal, it may be, nevertheless, that the testator complied with the statute, in this respect. He may have so complied by attaching a wafer, or by affixing a piece of paper with mucilage, or appending a seal to the will with a string or ribbon, or by writing on it any symbol or hieroglyphic which it was his habit to use as a seal.

Such or other compliance may have been proved to the satisfaction of the court below, although prior to the hearing and without the privity of the legatee, all traces thereof had been obliterated from the paper. It was unnecessary to make mention of the seal in the instrument. Even in case of a deed, the omission of the clause: "*in cujus rei testimonium*," &c., where a seal is affixed, is wholly unimportant; without it the instrument is a deed. Comyn's Dig., Title "Fait," A 2, F 2, note (z). A fortiori, this is true in regard to wills under our statute. If it could be held at this day that the destruction of the seal before issue joined avoids a deed, the same rule would not apply to a will, because by the act of sealing the condition imposed by the statute is performed, and for other and obvious reasons. 2 Grattan, 453; 1 Gallison, 70-174; 3 McLean, 334.

The order and judgment appealed from should be affirmed, and it is so ordered.

By WHITMAN, J., dissenting.

This case, so far as the transcript is concerned, comes up in an unsatisfactory manner. Questions of importance, suggested by brief, cannot be considered, because they are not properly before the court. All that can be reviewed is presented by the petition, objections, and order — substantially, the judgment roll.

It is objected, however, even to such review, that no appeal lies in the case thereby made, but the order admitting the will to probate is a judgment upon the pleadings and issues of fact and law presented, and from such judgment an appeal lies to this court. The petition avers that Henry Sticknoth died upon the tenth day of February, 1869, in Ormsby County, state of Nevada, having made upon the fourth of said month a will in favor of one Seibo Muntinga. That such will was not made in strict conformity with

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statute governing such cases, but that the act of the legislature March 4th, 1871, provided that it should be admitted to probate, "the same as though it was executed in conformity with the general law." The contestant objects, among other matters which cannot be considered, for the reason before suggested, that the law is unconstitutional, for several grounds specifically assigned. The clerk of the court admits the will to probate. Thus, by petition and objections, the statute is directly brought in question. That statute is as follows:

"SEC. 1. The paper purporting to be the last will and testament of Henry Sticknoth, deceased, is hereby declared to be as legal and valid as though the signature of the testator to the same is attested by two subscribing witnesses; and the claimant, Siebo Muntinga, is hereby authorized to offer said paper for probate before the proper court, and the same shall be considered by the court as if the signature of the testator was attested, as required by law.

"SEC. 2. Nothing in this act shall be construed as determining the issue of fact, whether said paper is the last will and testament of said deceased; but said issue shall be submitted to and be determined by the proper court.

"SEC. 3. Nothing in this act shall be so construed as to prevent any heir or heirs of said deceased from contesting the validity of the said paper purporting to be the last will and testament of said deceased, within the time allowed by law, should any such contestant or contestants appear.

"SEC. 4. No claim of Siebo Muntinga, or of any other person, to the money or estate of said Henry Sticknoth, deceased, and no action for the recovery of the same by any person, shall be held by any court to be barred by the statute of limitations or otherwise; provided, such claim shall be set up, or such action shall be commenced within twelve months from the date of the passage of this act.

"SEC. 5. All acts and parts of acts heretofore passed, so far only as they conflict with the provisions of this act, are hereby repealed." Stats. 1871, 129.

The first section of the statute is fatal to its validity. The con-

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stitution of the state of Nevada thus distributes the government powers: "The powers of the government of the state of Nevada shall be divided into three separate departments — the legislative, the executive, and the judicial; and no persons charged with exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others except in cases herein expressly directed or permitted." Const. Art. III.

Now in the first section of the act referred to, the legislative branch of the government says to the judicial, that it shall consider a certain paper "as if the signature of the testator was attested as required by law." The law referred to is as follows: "No will except such nuncupative wills as are mentioned in this act, shall be valid unless it be in writing, and signed by the testator, and sealed with his seal, or by some person in his presence, and by his express direction, and attested by at least two competent witnesses, subscribing their names to the will in the presence of the testator." Stats. 1862, 58, Sec. 3.

What this will was cannot be said, as it does not appear in the transcript. The vice of the statute, however, is in this, that it directs a specific course of judicial action in the matter of a specific paper, in favor of an individual, contrary to the general course of the law. It is urged that the second section of the statute remedies this. Does it? It graciously allows the court to decide upon the issue of fact, after taking away the ordinary statutory means of arriving at such decision. Here is a clear encroachment of the legislative upon the judicial function; which, under all forms of civilized government, has always been contemned and resisted.

It is claimed, however, that in this particular case no one has a right to object. That the statute is remedial and does not trench upon vested rights; for that no party could be interested in the estate save the heirs of Sticknoth, if any, or in their absence, the state; that the rights of the former are saved by section third of the statute, and that the act is a waiver of the rights of the state.

In the view taken of the statute this argument, however sound in itself, (which point will be hereafter considered) is beside the question. The judge upon the bench, if such view be correct, could properly

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have refused to obey the statute, and his action would have been sustained. The public administrator is charged with the care of all estates of intestates dying in this county, and in his official capacity represents all the world as against the party seeking to take the estate from his charge.

As the act was an infringement upon the judicial power in that it prescribed a distinct decision contrary to the general course of law in a special case, it was consequently unconstitutional and void, and thus afforded no basis for the order made. The objection could be made by the court, or any one properly before it in the case. The public administrator was so present in the line of his official duty, and has made such objection, which must be sustained.

Again, while substantially admitting that the act must fail if it interfere with vested rights, which is undoubtedly the law, respondent contends that there is no such interference; claiming first, that the rights of heirs, if any, are protected by section three of the act; and second, that the right of the state, the only other possible party in interest, might be waived, and has by the statute been so waived. The first position is sound; a fair construction of the section referred to does fully protect them. A similar construction of the entire statute leads to the conclusion that the legislature intended to, and did, so far as it had power, waive all rights of the state; but the correctness of this second point depends upon the solution of the question whether any such power exists in the legislature.

Upon the death of Sticknoth intestate his estate presently vested in some one, either in heirs, or, failing any heir, in the state of Nevada. As has been said, the rights of the former are protected, and it may be admitted if the right of the state was general the legislature might rightfully waive it, as has been attempted in this instance. But it is not so. It is provided by the constitution enumerating several sources of revenue for school purposes, that *

* * * * * "all estates that may escheat to the state"
* * * * * "and all proceeds derived from any or all of said sources shall be, and the same are hereby, solemnly pledged for educational purposes, and shall not be transferred to any other fund for other uses." The word escheat used as quoted must be deemed to be coëxtensive with its statutory definition, which includes

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personal as well as real estate, thus: "If any person shall die, or any person who may have died within the limits of what is now the territory of Nevada, seized of any real or personal estate, and leaving no heirs, representatives or devisees capable of inheriting and holding the same, and in all cases when there is no owner of such real estate capable of holding the same, such estate shall escheat to and be vested in this territory." Stats. 1861, 240, Sec. 32

From this it will be seen that the legislature has no power over this fund, its sources or proceeds, save to use it and them as provided. It cannot even be borrowed for state purposes by diverted to other funds, much less be diminished by appropriation or surrender to a private individual. At Sticknoth's death, failing heirs, the right to his estate became immediately vested in the school fund and its beneficiaries, and the legislature could in no wise alter such disposition. So the act does interfere with a vested right, and upon this ground also must fail.

I think the order and judgment appealed from should be reversed, and therefore dissent from the opinion of the court.

JOHN McCAUSLAND, RESPONDENT, v. JAMES M. LAMB
et als., APPELLANTS.

APPEAL—TRANSCRIPT WITHOUT STATEMENT. Where a transcript on appeal contained neither a statement on motion for new trial nor on appeal: *Held*, that there was nothing in it for review except the judgment roll.

CLERICAL MISTAKE IN JUDGMENT—ERRORS NOT NOTICED BELOW. Where appeal from a judgment it appeared that there was a clerical mistake in rate of interest, but such mistake had not been brought to the attention of the court below: *Held*, that the Supreme Court would not notice it.

APPEAL from the District Court of the Second Judicial District, Washoe County.

This was an action for judgment on a promissory note for \$3,000 and interest at the rate of two per cent. per month, and to foreclose a mortgage therefor given by James M. Lamb to J. S. Lamb.

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ember, 1869, on certain lots in the town of Verdi, Washoe ty, and a one-fourth interest in the "Verdi planing mill and y." Plaintiff was the assignee of such note and mortgage. y Menke, John King, William J. Bell, Alonzo Smith, Robert and James Mayberry were also made defendants, as having iming to have an interest in the mortgaged premises. Menke a separate answer, as did also Blair; and afterwards King, and Smith answered. To the answers of Blair, King, Bell mith, plaintiffs interposed a demurrer; and Menke was allowed in such demurrer, which subsequently was sustained so far intiff and Menke were concerned; but overruled as to the s. There was a judgment of foreclosure: first, in favor of iff, next of H. Menke, the holder of another mortgage, and of Bell, Blair, Smith, and King, the holders of still another age. The latter four claimed that the property mortgaged was ership property of Crow, Lamb & Co., and their mortgage a ership mortgage, while the others were individual mortgages; is they who took this appeal.

the judgment, by a clerical mistake the rate of interest to be he plaintiff was stated to be three per cent. per month instead o per cent.

e transcript contained no statement of any kind, or bill of tions.

Thomas E. Hayden, for Appellants.

Plaintiff and defendant Menke demurred to the answer of dants King, Blair, Smith, and Bell. The court supported demurrer, and thereby precluded those defendants from show- at plaintiff's debt was the individual debt of Lamb, and only et to payment after the satisfaction of the copartnership age. Defendants King and others not having the right to l from the order sustaining such demurrer, appeal from the udgment, and desire the review of the order sustaining such rrer in favor of plaintiff and Menke. That order was not an able order. No statement could ordinarily be filed in such a because a statement is to be filed within twenty days after

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the entry of judgment or order; and such statement made before the entry of judgment.

II. The error in requiring plaintiffs' judgment to bear interest at three per cent. per month is patent and must be corrected.

III. The only object of a statement or a bill of exceptions is to make that record which, without it, would not be record; but in this case the demurrer as one of the pleadings properly forms the judgment roll, and properly goes before the appellate court. See *Huse v. More*, 20 Cal. 115; *Williams v. Glasgow*, 1 Nev. 100; *State v. Earl*, 1 Nev. 396; *Howard v. Richards*, 2 Nev. 100; *Foulks v. Pegg*, 6 Nev. 137.

W. E. F. Deal, for Respondent.

I. The appeal is only from the final judgment. No statement on appeal was filed. The only question then is, whether the appeal is supported by the pleadings.

If appellants desire to have any intermediate orders affecting the judgment appealed from, and not forming a part of the judgment roll reviewed, they must by means of a statement on appeal put them into the record, together with such facts forming the basis of the order as are necessary to explain the action of the court.

II. It is true, there is a clerical mistake in the judgment roll that could have been corrected in the court below. The court should be corrected in this respect; but at the cost of

H. B. Cossitt, for Respondent Menke.

By the Court, WHITMAN, J. :

This is an appeal from a judgment decree and orders. The main complaint of error is in the action of the court in sustaining the demurrer to the answer. With regard to the consideration of that and other errors, the respondent insists that there is nothing in the transcript except the judgment roll, there being no statement on appeal for new trial or on appeal. Such is the fact; and that no error appears upon such roll, except what

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mistake in the rate of interest. As that was not brought to attention of the court below, it will not be noticed here. *Ehr-Curry, ante, 221.*

Judgment and decree of the district court are affirmed.

BER, J., did not participate in the foregoing decision.

STATE OF NEVADA, *ex rel.* WM. SHARON *et al.*,
PETITIONERS, v. A. D. TREADWAY *et al.*, RESPONDENTS.

LAND WARRANT NOT RECEIVABLE FOR OTHER THAN SCHOOL OR LIEU LAND. Where one Cleaveland applied to the state to purchase certain public land, which however was not part of a sixteenth or thirty-sixth section, or of a section selected in lieu thereof, and deposited a land warrant issued under the Act of February 27th, 1865, to pay therefor, (Stats. 1864-5, 173 ; 1866, 194): Held, that such warrant was not receivable in payment for that class of land, and that no right accrued to Cleaveland or his grantees.

PURCHASABLE WITH SCHOOL LAND WARRANTS. The only land which could be purchased with a school land warrant, as the law stood in 1868 and 1869, was that embraced in a sixteenth or thirty-sixth section or land selected in lieu thereof.

LAND ON UNLOCATED LAND WARRANTS. The privilege given by Section 7 of the Act of April 2, 1867, (Stats. 1867, 165) to "the holders of any unlocated land warrant," is limited to lands "subject to sale by private entry."

DECREED from the District Court of the Second Judicial District,
Clark County.

It was an action by The State of Nevada *ex rel.* William Sharon and Joseph A. Rigby, and William Sharon and Joseph A. Rigby, against A. D. Treadway and T. J. Edwards for an injunction to restrain Treadway from collecting a judgment recovered by him in the case of *Treadway v. Sharon and Rigby* (*ante, 37*) and Edwards, the clerk of the district court, from enforcing execution thereon; also for a decree declaring the judgment issued to Treadway null and void. A preliminary injunction having been granted, it was afterwards on motion of defend-

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ants dissolved; and it is from the order of dissolution that this appeal was taken.

After the appeal was taken, it was stipulated by the parties that the land described in the complaint was selected by the state on July 3d, 1868, in part satisfaction of the 500,000 acres granted to the state by the United States under the act of congress of 1841 and succeeding acts; and that the cause should be considered as if that fact had been so alleged in the pleadings. The selection was approved February 28th, 1869. Cleaveland made his application for the land and filed his school land warrant in April, 1867; in August, 1868, he sold to Joseph de la Montagnie and O. Dickinson, jr., the grantors of the plaintiffs Sharon and Rigby. Treadway procured his patent from the state in October, 1869.

W. E. T. Deal and Williams & Bixler, for Appellants.

I. The act of congress granting the state 500,000 acres of land was a present grant of that quantity, to be selected out of such lands as were open to selection in such manner as the state, by its legislature, should direct. As soon as the selection was made, the general gift of quantity became a particular gift of the specific lands located, vesting in her a perfect and absolute title to the same. *Bludworth v. Lake*, 33 Cal. 262, and cases there cited. Cleaveland, by the purchase of Warrant 21 and the location thereof on the land described, became entitled to the patent as soon as the selection was confirmed, there being no other applicant claiming the preferred right to purchase. The state held the legal title in trust only for him till the patent should come. *Bludworth v. Lake*, 33 Cal. 262; *O'Neale v. Cleaveland*, 3 Nev. 491; Stats. 1867, 165, Secs. 1 and 7.

II. Plaintiffs Sharon and Rigby are proper parties. All the plaintiffs are interested in having the patent set aside, and the state is interested in preventing the collection of the judgment in the action at law, obtained solely by means of the patent issued through the mistake and inadvertence of its officers, and by the practices of Treadway. Story's Eq. Pl., Sec. 278; *People v. Morrill*, 25 Cal. 360; *Central Pacific Railroad Co. v. Dyer et al.*, U. S. Supreme Court.

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llis & King, for Respondents.

he patent cannot be set aside, conceding every allegation in complaint to be true. The land warrant could never be located on any land save a sixteenth or thirty-sixth section, or lieu land, on the terms of the law under which it was issued, until the passage of the Act of 1871. The land in question was not selected by the state until July 3d, 1868, or under the theory of the bill until July 1st, 1869; hence, it could not be sold as the sixteenth or thirty-sixth sections, and the warrant could not be located on this land at all.

By the Court, WHITMAN, J. :

There are many interesting and intricate questions raised on this appeal, which it is useless and improper to consider, because the majority position of respondents disposes of the entire case, in whatever phase it may be considered. The bill shows that one Cleveland made application to purchase the southeast quarter of section twenty-four, township sixteen north, range nineteen east, and deposited with the register land warrant number twenty-one, issued under the state law of 1864-5 for the disposition of the sixteenth and thirty-sixth sections of the public lands, to pay therefor; that afterward he sold his interest in the land to the grantors of plaintiffs Brown and Rigby; that subsequently he withdrew the warrant so deposited; and thereafter, on the twenty-seventh day of October, 1869, respondent Treadway secured a patent for the land.

This action is alleged to have been collusive—a conspiracy between Treadway and Cleveland, and in fraud of the rights of the trustees of the latter; wherefore the demand for relief herein. To the demand respondent Treadway says, admitting all the facts alleged, I deny the conclusion deduced; for the bill shows upon its face, in connection with the stipulation on file, that the land sought to be purchased was not selected in lieu of the sixteenth or thirty-sixth section—and the warrant deposited, being at the time of deposit and withdrawal only receivable in payment for that class of land, no rights accrued to Cleveland, and no obligation was incurred by the state.

Upon examination of the statute in force at the time of Cleav-

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nd's application, deposit of the warrant and withdrawal of t
ame, it will be seen that the only land which could be purchas
with such a warrant was that embraced in the sixteenth or thir
sixth sections, or land selected in lieu thereof; within which ca
gory, it is expressly stipulated between the parties to this appe
the land in question does not come. Stats. 1867, 165-171.

There is some language in Section 7 of the Act of 186
which, it is claimed by appellants, would authorize a different co
clusion; but a reference to the section will prove this posi
untenable. The privilege there given to "the holders of a
unlocated land warrant" is limited to the lands "subject to sale
private entry." The act is confused and verbose, but still compr
hensible; and no allowable construction will give it the meanin
claimed by appellants.

This view disposes of the whole case, as there is nothing in th
point that plaintiffs Sharon and Rigby, as occupants, had six month
preference of purchase, which was nullified by the premature issua
ance of the patent; for they did nothing within that time to indicat
a desire to exercise such preference. The land was selected by
the state, July 3d, 1868. *Treadway v. Mason and Rigby, ar et*
The whole tenor of the act shows that the selection is to have da
from the act of the state in making the selection; the most favo
able construction for plaintiffs Sharon and Rigby could only exte
such date to the time of approval of the selection by the Unit
States, which was upon the twenty-eighth day of February, 186
more than six months before the issuance of the patent to Tre
way. The objection that notice was not published in the cou
where the land was situated does not touch this case, admit
that such neglect could, in any event, invalidate a patent; as
is required with regard to lands selected by the regents, not b
register, and which are offered for proposals. Sections 4, 5 &
Act of 1867.

Precisely how the purchase was made by Treadway do
appear by the bill; but whether regular or irregular, p
Sharon and Rigby cannot complain, unless some right of th
injuriously affected thereby; and so far as the state is cor
it has no interest as shown by the bill, except perhaps to

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aid to protect a violated right of some one or more of its citizens; **and**, as has been seen, that is not the case here.

The order of the district court in dissolving the injunction was **correct**, and is affirmed.

M. V. B. GILLETTE, v. JOHN SHARP.

PAYMENT OF JURORS' FEES BY COUNTIES—PEREMPTORY STATUTE. The act of 1871, relating to the fees of jurors, and requiring the county auditor to draw his warrant on the county treasurer therefor, upon the certificate of the clerk of the court showing the amount due, (Stats. 1871, 56) is peremptory, and admits the exercise of no discretion on the part of the auditor.

THE LATEST EXPRESSION OF LEGISLATIVE WILL, THE LAW. Section 1 of the act of 1871, (Stats. 1871, 56) requiring the auditor to draw his warrant upon the treasurer for jurors' fees upon the certificate of the clerk of the court showing the amount due, conflicts, with evident intention, with sections 9, 10 11 and 12 of the act concerning county commissioners, (Stats. 1864-5, 259); and being the subsequent expression of legislative will, it overrides them to the extent of creating an exception, in favor of jurors, to the general rules requiring claims against counties to be audited as therein prescribed.

This was an application to the Supreme Court for a mandamus requiring John Sharp, the county auditor of Nye County, to draw his warrant on the treasurer of that county in favor of the petitioner Gillette for \$28.50, for his fees and mileage as a juror at the August term, 1871, of the fifth district court. The questions involved were presented on an agreed statement of facts, in which the fact of the petitioner's attendance as a juror, the distance of his residence from the court, the certificate of the clerk of the amount due, and the demand upon and refusal of the auditor to draw his warrant, were set forth. It was also agreed that the account had not been presented to, or allowed or acted upon by the county commissioners, nor presented to the auditor for allowance or approval. It was also agreed that at the time of the demand upon the auditor there was no money in the treasury of Nye County, and that there were then outstanding and unpaid audited and allowed accounts against the general fund in the sum of nine thousand dollars. Counsel further stipulated that if the writ should

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issue, it should designate the fund on which the warrant should drawn.

Frank Owen and John Bowman, for Petitioner.

The act leaves no discretion to the auditor; for when an account is presented to him under the provisions of the act, he is commanded absolutely to draw his warrant on the treasurer for the amount specified in the account. There being no funds in the treasury was no ground for refusing to draw a warrant as demanded. *2 Cauley & Tevis v. Brooks*, 16 Cal. 11; *Humboldt County v. 2 County Commissioners of Churchill County*, 6 Nev. 30.

George R. Williams, for Respondent.

The act of 1871 does not wholly repeal sections 9, 10, 11 and of the act relating to county commissioners, but repeals them, if all, only so far as they conflict with it. It does not conflict with the portions of those sections which prescribe the duties of the county auditor. The act does not make jurors preferred creditors; their accounts should be presented to the county commissioners and the county auditor for their approval, and paid in the order of the registration, the same as other accounts against the county, and out of the general fund.

By the Court, WHITMAN, J.:

In 1871, the legislature passed the following act, amendatory of the statute of 1869:

“SECTION 1. Each juror summoned in the state, whether petit or grand juror, unless he be excused by the court from serving on the day he is summoned to attend court, shall receive three (3) dollars per day for each and every day he may be in attendance upon court, and fifteen cents per mile in traveling to and returning from court, all of which shall be paid out of the county treasury. The auditor shall draw his warrant on the treasurer for the compensation provided in this act, upon certificate of the clerk of the court showing the amount due.” * * * Stats. 1871, 56.

The main differences between the statute of 1871 and that of 1869 are, the substitution of the clerk's certificate for any and

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other auditing or verification of the demand; and the positive requirement upon the auditor to draw his warrant, upon presentation of such certificate. In these respects it conflicts, with evident intention, with sections 9, 10, 11 and 12 of the act creating a board of county commissioners, (Stats. 1864-5, 259); and, being the subsequent expression of legislative will, must override them to the extent of creating an exception in favor of jurors to the general rules therein expressed.

As the direction to the auditor is peremptory and admits no exercise of discretion, and the agreed facts present no obstacle thereto, the mandamus asked should issue, directing respondent to draw his warrant upon the treasurer in favor of petitioner, for the amount certified by the clerk. What fund should be drawn upon, is for the auditor to ascertain in the proper exercise of his powers.

Let a peremptory mandamus issue.

By GARBER, J., dissenting:

There can be no difference of opinion or controversy as to the rule of law concerning the repeal, total or partial, of statutes, by implication. Such repeals are not favored. The uniform language of the books is that, while the old statute gives place to the new one, this is to be understood only when the latter is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. But if both be merely affirmative, and the substance such that both may stand together here, the latter does not repeal the former, but they shall both have a concurrent efficacy. 1 Black. Com. 89. Hence are deduced the rules that courts are bound to uphold the prior law, if the two may subsist together, or if it be possible to reconcile the two acts together; and that there is no repeal by implication, unless it is absolutely necessary in order that the later act shall have any meaning at all. 1 Black. 470; 25 Ind. 167; 2 Beas. (N. J.) 291.

By section 10 of the statute of March, 1865, it is provided that no warrant shall be drawn by the auditor on the county treasurer on any fund, unless the money be therein at the time to pay the same, and that any warrant drawn contrary to such provision shall be absolutely void. The statute of 1869, fixing the compensation

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of justice provides that: - The board of county commissioners shall audit and allow the compensation provided in this act, upon the certificate of the clerk of the court showing the amount due." The amendment of 1871 simply dispenses with the action of the board as a condition precedent to the drawing of the warrant by the auditor, and directs its issuance upon the clerk's certificate, in lieu of the order of the board based upon the clerk's certificate. Not only is it not impossible for the clause of section ten above quoted to subsist with this amendment, but it is clear that there is no repugnancy whatever between them. Without holding that the latter repeals the former, we can not only give to the amendment some meaning, but it can have the very meaning and operation which the legislature must have intended, for there is nothing to indicate an intention to make jurors preferred creditors. All that appears is an intention to prescribe a rule of evidence or a mode of authentication, by which the existence and amount of their claims should be established. So far as this is concerned, the former provisions of the statute are repealed, and thus far only. The auditor must now draw his warrant on presentation of the certificate, as formerly he must have drawn it on submission of the order of the board; subject however, in each case, to the auxiliary provision of section ten above quoted.

Any other construction would not only be in direct disregard of the settled law on the subject of repeals by implication, but tend necessarily to the introduction of disorder and confusion into the financial affairs and business of the counties. And I can see no reason why, once his claim is adjusted and established, a juror should be allowed a warrant for its payment on any other terms than in any other manner than the same is allowed to other persons whose claims have been reduced to equal certainty, though by a different method. But it is enough, for the purposes of this case, to consider that there is no necessary or irreconcilable conflict or repugnancy between the said clause of section ten and the amendment; as the case states that there was no money in the treasury when the warrant was demanded. I think the petition should be denied.

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TER W. VANSICKLE, RESPONDENT, v. JAMES W. HAINES et als., APPELLANTS.

DIVERSION OF WATER ON PUBLIC LAND CONFERS NO RIGHT AGAINST GOVERNMENT. Where a person diverted and appropriated the waters of a creek on public land from its natural channel; and afterwards the land, on which its natural channel was situated, was patented to another: *Held*, that the former acquired no right against the government; and that the patent carried all the right of the government, which was absolute and unincumbered by any diversion or appropriation, to the patentee.

PRESUMPTION OF GRANT AGAINST GOVERNMENT. The diversion and appropriation of the water of a creek on the public land gives rise to no presumption of a grant as against the government; and, except in cases specially provided for, no statute of limitation runs against it.

PATENT TO LAND PASSES UNINCUMBERED FEE OF SOIL AND INCIDENTS. A patent to land from the United States passes to the patentee the unincumbered fee of the soil, with all its incidents and appurtenances, among which is the right to the benefit of all streams of water which naturally flow through it.

RIGHT TO NATURAL FLOW OF WATER NOT AFFECTED BY QUESTION OF USE. The right of the owner of the soil to the natural flow of a stream of water through his land, is not affected by the question as to what use he will put it to.

ABSOLUTE OWNERSHIP BY UNITED STATES OF PUBLIC LAND AND WATER—PATENTS. The United States has an absolute and perfect title to, and the unqualified right of property in, the public land; and, as running water is an incident to or part of the soil over which it naturally flows, a patent carries not only the land but the stream naturally flowing through it, and the same right to its use or to recover for a diversion of it, as the United States or any other absolute owner could have.

RIGHT OF LAND OWNER TO NATURAL FLOW OF WATER THROUGH IT. The owner of land over which a stream of water naturally flows, has a right to the benefits which the stream affords, independently of any particular use; that is, he has an absolute and complete right to the flow of the water in its natural channel, and the right to make such use of the water, when he chooses, as will not damage others located on the same stream and entitled to equal rights with himself.

EFFECT OF UTAH TERRITORIAL LEGISLATION AS TO PUBLIC LAND. Before the United States can be held bound by the acts of the territorial legislature of Utah as to the public land, it must appear that such legislation was submitted to congress and not disapproved by it.

CONSTRUCTION OF GRANTS OF GOVERNMENT. Grants by the government must always be construed most favorably to the government; they pass nothing by implication.

UTAH LAWS AS TO DIVERSION OF WATER. The law of Utah Territory respect-

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ing the grant of water rights, (Com. Laws Utah, 12, Sec. 38) purported to authorize the county court to grant a right to divert water, but did not purport to authorize any individual to make such diversion without the sanction of the court.

UTAH LAW AS TO INFRINGEMENT OF WATER RIGHT. The law of Utah Territory respecting infringements upon water rights, (Com. Laws Utah, 156, Sec. 7) granted no right of any kind to divert water, but simply provided a punishment for the violation of rights supposed already to exist.

UTAH TERRITORY COULD NOT CONFER RIGHTS TO WATER ON PUBLIC LAND. Under the act of congress organizing the territory of Utah, which provided that the territorial legislature should pass no law interfering with the primary disposal of the soil, no act of the legislature would have been valid that in any way attempted to confer any right to the water of the streams on the public lands.

CONGRESSIONAL LEGISLATION AS TO DIVERSION OF WATER ON PUBLIC LAND. It appears from the act of congress of July, 1866, which seems to have been adopted simply to protect those who at that time were diverting water from its natural channels on the public land, that no diversion had previously been authorized.

PREEMPTIONER ON ONE QUARTER SECTION HAS NO RIGHT TO DIVERT WATER FROM ANOTHER. A preëmptioner, while occupying and improving a quarter section of the public land, has no right to enter upon another quarter section, to which he makes no claim, and divert from it a valuable stream of water for the benefit of the land which he is claiming.

RIGHT OF PATENTEE TO HAVE DIVERTED WATER RETURNED TO NATURAL CHANNEL. A patent to land from the United States, (previous to the act of congress of July, 1866) carried with it a stream naturally running through such land as an incident thereto, together with the right to have it returned to its channel, if diverted.

NATURE OF PRESUMPTION ARISING FROM ADVERSE HOLDING. The presumption arising from adverse holding or user for the period prescribed by the statute of limitations, is not a presumption of a grant against any particular person, but against the *title* under which he holds.

TITLE BY PATENT WIPES OUT ALL FORMER TITLES. Where a person acquires a United States patent to land, he acquires a new title, against which there is no prescription; in other words, his patent sweeps away all former titles, and confers upon him as complete a title as the United States had.

PRESUMPTION RESPECTING ADVERSE USER OF WATER SAME AS OF LAND. The presumption respecting the adverse user of water stands upon the same footing as that respecting the adverse user of land; and the reasoning which will sustain the one will likewise uphold the other.

ADVERSE USER OF WATER ON PUBLIC LAND CANNOT BE SET UP AGAINST PATENTEE. The time during which a person diverts water from public land previous to the issue of the patent, cannot be set up as an adverse user against the patentee.

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ADOPTION OF THE COMMON LAW. The territorial statute adopting the common law of England (Stats. 1861, 1) was adopted by the state constitution (Con. Schedule, Sec. 2).

RIGHTS OF RIPARIAN PROPRIETORS ON NON-NAVIGABLE STREAMS. The common law rule as to running water allows all riparian proprietors to use it in any manner not incompatible with the rights of others; so that no one can absolutely divert all the water of a stream, but must use it in such a manner as not to injure those below him.

RIGHT OF APPROPRIATION OF WATER NOT AVAILABLE AGAINST TITLE TO SOIL. The early decisions of this state and those of California, holding that priority of appropriation gave a right to the use of water, were made in cases where there was no title to the soil, and have no bearing in cases where absolute title has been acquired.

APPEAL from the District Court of the Second Judicial District, Douglas County:

It appears that in 1857, the plaintiff Vansickle diverted, by a ditch for irrigating and domestic purposes, one-fourth of the water of Daggett creek, a small tributary of the Carson river in Douglas County. He made the diversion at a point then on the public land, which in 1864 was patented by the United States to the defendant Haines. In 1865, Vansickle obtained a patent for his own land where he used the water. In the fall of 1867, Haines and his co-defendants, William F. Leet and Charles Vangordor, constructed a wood flume on Haines' land, and turned into it all the water of the stream, thereby depriving the plaintiff of that part of it which he had been using. In November, 1870, plaintiff commenced this action, asking for \$1,500 damages and an injunction to restrain further diversion of that portion of Daggett creek claimed to have been appropriated by him. There was a decree for plaintiff substantially as prayed for, from which defendants took this appeal.

R. S. Mesick, for Appellants.

I. Prior to the patent to Haines, the land at the point of diversion of Daggett creek was a part of the public domain, and belonged to the United States government. It cannot be claimed that the government lost any part of its estate under any statute of limitations, for as against the United States the statute of limitations is inoperative. Angell on Lim., Sec. 39; Washb. on Real Prop.,

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Book III, Chap. II, Sec. 7, §§ 38, 42; 6 Pet. 666; 20 Geo. 467. Nor could any prescriptive right as against the government be inferred, for the reason that no inference of a grant can be indulged in such case.

II. Prior to 1866, there was no law of the United States by which an easement in such land, separate from the land itself, could be carved out of the estate of the government and granted. Therefore, no presumption of a grant of any such easement, separate from the land, can be indulged.

III. The title conveyed by the patent to Haines was a full and absolute title to the land and to the water flowing over it, and it was sufficient to exclude all private persons from the land and from diverting water from it. The owner in fee of land has the title to and control over water naturally flowing over it, to the same extent and in the same sense as he has to and over the soil itself. 1 Colk upon Litt. 4 *a*; Cooley's Black. Com., Book II, Chap. II, and note 4; *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 193; Angell on Water-courses, Sec. 5, and authorities cited in note 3, Secs. 10, 11, 132; Washb. on Real Prop., Book II, Chap. I, Sec. 3, § 40; Washb. on Easements, 270, 274, 281; 1 Brightly's Dig. 500, Sec. 232.

IV. The right which is awarded to the plaintiff by the judgment is plainly an easement in the real estate of Haines, lying wholly in *grant* and not at all in *livery*. Washb. on Real Prop., Book I, Chap. I, Sec. 3, §§ 1-5.

V. Had the patent to plaintiff been made while the land Haines was public land, no easement in such land in favor of plaintiff would have passed by the grant; and much less can such right be held to have passed to him by the grant of the government made subsequent to the patent of Haines. That such right would not have passed to plaintiff under the grant to him, had the land of Haines at the time been public land, is well settled. *Wilcox v. McGhee*, 12 Ill. 381; *Tabor v. Bradley*, 18 N. Y. 109.

VI. The plaintiff was in the attitude of a trespasser when the grant was made to Haines, and the government cannot be presumed

to have intended to burthen the estate of a purchaser for the benefit of a trespasser. Nor can it be presumed even that the government was aware that the Haines tract was in any way tributary to the Vansickle tract at the time of the grant to Haines.

Robert M. Clarke, for Respondent.

I. The rights of Haines as a riparian proprietor do not constitute a property in the corpus of the water, but a right to the use of it for his natural wants as it flows in the bed of the stream. *Mason v. Hill*, 5 Barn. & Ad. 1; *Pugh v. Wheeler*, 2 Dev. & B. 50; *Howell v. McCoy*, 3 Rawle, 256; *Thomas v. Bruckney*, 17 Barb. 654; 1 Sim. & S. 190; 4 Mason, 397; 50 Me. 604; 2 Allen, 287; 35 N. Y. 524.

II. Whatever may have been the abstract rights of Haines as a riparian proprietor, they are distinct from those of Haines, Leet, and Vangordor, as appropriators. Though Haines, as riparian proprietor, might have the right to use so much of the water as was necessary or proper to satisfy his natural wants, including the irrigation of his land, still it follows, both upon principle and authority, (there being no property in the water and no estate except in its use, and this use being fully supplied) that Vansickle could lawfully appropriate the surplus after Haines' natural wants were supplied, and that such appropriation, even if not of right, is, as to Haines, *damnum absque injuria*, and as to Haines, Leet, and Vangordor, as appropriators, first in time and therefore superior in right. *Tyler v. Wilkinson*, 4 Mason, 397; *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191; *Cary v. Daniels*, 5 Met. 239; 11 Met. 281; 8 Penn. 22.

III. By all the authorities, ancient as well as modern, the only estate or interest that can be acquired in flowing water is in its use—a usufruct. There can be no property in, or title to, the corpus of the water. 2 Black. Com. 18; *Liggins v. Inge*, 7 Bing. 692; *Tyler v. Wilkinson*, 4 Mason, 397; *Embrey v. Owen*, 6 Exch. 333; 3 Kent, 439; *Kidd v. Laird*, 15 Cal. 161; *Mayor v. Commissioners of Spring Garden*, 7 Penn. State, (Burr) 363.

IV. As the complaint is for abstracting a part only of the water

customarily flowing in the stream, and as there is left sufficient to answer the purposes and satisfy the wants of the riparian owner no right is violated nor injury sustained; no wrong is done which will support an action, either at law or in equity. Washburne on Easements, 295; *Elliott v. Fitchburg R. R. Co.*, 10 Cushing 191; *Howell v. McCoy*, 3 Rawle, 256; *Shreve v. Voorhees*, Green Ch. 25; *Thompson v. Crocker*, 9 Pick. 59; 5 Ohio, 320 17 Conn. 288; 6 Exch. 353; *Wadsworth v. Tillotson*, 15 Conn. 866; 51 Maine, 290; 10 Barb. 518.

Unless the doctrine herein maintained be correct, there is necessarily an end to the appropriation of water, or to the use of it for irrigation, or indeed for any purpose whereby the flow is impeded or the quantity diminished; for each riparian proprietor could insist upon the uninterrupted and undiminished flow in the bed of the stream, and by this means prevent any valuable use.

V. A usufruct in running water may be acquired by appropriation or occupancy, and our legislature gives powerful support to the doctrine. Stats. 1861, 87, Sec. 146; Stats. 1862, 10; Stats. 1864-5, 348; Stats. 1866, 202; Stats. 1869, 129. This legislation is a full recognition of the rights of appropriation and diversion, and is wholly inconsistent with the theory of a property in running water distinct from its use.

VI. The land under the water of Daggett creek passes by patent, just as does the land under the Ohio river; but the water flowing over the surface is in no manner affected by the patent, more than the air passing over, or light illuminating the surface. This is *publici juris, res communis*, the property of no one, free to all; and not being property, constituting no part of the land, no right to or estate in it. It cannot be claimed that the government has a property in the water of an unnavigable stream, or that such property passes by patent in such manner as to vest, not only in the stream in its then condition, but also to cut off, by relation, rights previously acquired by actual appropriation and use.

VII. The Mexican Mill company, as long ago as 1861, at an expense of hundreds of thousands of dollars, put a dam into the Carson river, constructed a canal four miles in length, and erected a mill, the machinery of which is propelled by the power of the

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stream. Can it be possible no rights have resulted from this appropriation and use that may not be overthrown by Jones, who, since the diversion, and only yesterday, acquired patent to the hundred and sixty acres contiguous to the river and immediately below the dam, and this without respect to his necessities as a riparian owner? May he, without requiring the water, or even by erecting a mill and thus creating a necessity for the use, defeat the appropriation and destroy the use acquired by the Mexican company? Unless consequences like these are to be sanctioned; unless all rights of appropriation are to be overthrown; unless the basis upon which rest the most extensive and valuable property interests in this state is to be razed, the rights of the plaintiff must be sanctioned and the pretenses of defendants denied.

VIII. But Haines is cut off from making the defense interposed by the statute of limitations and by adverse possession for more than five years, and the presumption of grant resulting from such adverse possession. Stats. 1867, 185, Sec. 3; *Arrington v. Liscom*, 34 Cal. 365; *Grattan v. Wiggins*, 23 Cal. 36; 1 Burr, 119; 2 Black, 605; 31 Maine, 384; Washburne on Easements, 101—105; Angell on Water-courses, Sec. 204.

R. S. Mesick, for Appellants, in reply.

I. No prescriptive right or implications of grant in plaintiff's favor from Haines can arise, because plaintiff could not have enjoyed the right for the period of five years from the date of the grant by the United States to Haines.

II. A riparian owner is entitled to have a stream flow in its natural channel through his land, whether he has any use for the water or not. This right is an incident of his estate in the land. *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191.

By the Court, WHITMAN, J.:

Respondent claims damages against appellants for past diversion of the waters of Daggett creek, and prays an injunction against further continuance of the injury alleged. The district court found for respondent; hence this appeal. Many questions are argued in

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the briefs of respective counsel, which it is believed are pertinent to the controlling question involved.

The district court finds that the water-course in question is a non-navigable stream, nowhere in its natural channel runs through the land of respondent; but does so run through the land of Haines. It is also found that the respondent and Haines were the owners in fee of their respective lands, by patents from the Government of the United States, that of Haines bearing date January 28th, 1864; that at such date, and long prior thereto, respondent had appropriated and diverted from the natural channel of the creek, for his necessary purposes, a portion of its water. The respondent's appropriation was interfered with by appellants in December, 1881, and that since that time they have used all or nearly all the waters of the creek, in a flume constructed and worked jointly for running wood. The court concludes that respondent acquired such a right by his appropriation, as should be protected in equity.

He acquired no right against Haines prior to the date of the latter's patent which could affect that grant, because the title in Haines to be affected by acts of the respondent. He acquired no right against the United States, for as to that Government he was a trespasser, in that he diverted water from the public domain not sought to be preëmpted by him. No presumption arises against the sovereign, and no statute of limitation runs against it in some excepted instances, of which this is not one.

The government of the United States then had, at the time of its patent to Haines, the unincumbered fee of the soil, its appurtenances; that was passed to Haines, there being no reservation in his patent, and none is suggested. He became the owner of the soil, and as incident thereto had the right to use it for the benefit to be derived from the flow of the water therefrom. No one could lawfully divert it against his consent. Whatever use was made of it, so that such use did not interfere with the rights of the riparian proprietors, was for him to elect. He had precisely the same right to use it for his flume as for his household, his garden, or his land.

In this case, it is urged that such use is beyond riparia

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cent case in New York, an objection precisely contrary was and the reply of the court is a complete answer to either th: "It is insisted by the defendant that equity ought not interfere in behalf of the plaintiffs, for the reason that they do not get the water-power afforded by the stream for use. This is an assumption. * * * * *

if the facts claimed were clearly established, it would not prove the defendant in wrongfully withholding the stream. No man is justified in withholding property from the owner, when required to render it, on the ground that he does need its use. The courts may do what they will with their own." *Corning v. Troy and Nail Factory*, 40 N. Y. 206. From the facts found, it appears that appellant Haines, owner of the soil, has the right to use of the water of Daggett creek in its natural channel; and so he may make of it when there is beside the question, so far as the respondent is concerned. The right of Haines protects his interests. The decree of the district court is reversed, and the case remanded, with instruction to enter a decree for appel-

After the rendition of the foregoing decision, a petition for rehearing was presented; in response to which the following opinion was rendered at the January term, 1872:

The Court, LEWIS, C. J.:

When this case was originally before us, we gave it the most careful and thorough consideration, and were drawn to the conclusion which we arrived at by an uniform current of decisions, the correctness of which has never been questioned — by rules as well established as any in the books, and the logic of principles which have become maxims in the law. Still, although no new point is presented, we are asked to grant a rehearing, upon the assurance and outset that it is asked only upon the strongest conviction that error is demonstrable. The argument presented, however, falls far short of satisfying the expectations thus awakened. We are also unable to understand from the petition what exact

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condition is assigned to running water in the catalogue of real property; or what the nature of the title which may be required to it, if any. Much thereof is devoted to showing that there can be no property in running water; that it is and of necessity must remain common to all; that it is a thing "the property of which belongs to no person, but the use to all"; and in the same sentence it is said that it "is *publici juris, res communis, bonum vacans*." This *abandon* in the use of legal expression is evidently the result of a radical misunderstanding of the position which is given to them in the books of law. True, it is said that water is *publici juris*, or belongs to those things which are *res communis*; but how it can be either *publici juris* or *res communes* and also *bonum vacans* is a problem not yet solved by the science of the law. If common property, or, as argued by counsel, something in which no one has an absolute property, but in which one has the use; the right to the use certainly must then belong to the community: but *bonum vacans* is property without an owner of any kind, and which belongs absolutely to the person who first finds or appropriates it, and he has the complete right of property in it as against the world, except the real owner. It is a flat contradiction in terms, to say that running water is at the same time common property and *bonum vacans*. But we have the word of Denman, in *Mason v. Hill*, 5 Barn. & Adolph. 22, and of Lord Park in *Embry v. Owen's Ex.*, that it was never considered as *vacans*. Nor are these contradictions confined simply to these terms. The argument proceeds upon the assumption that running water belongs to the community generally, and authorities are cited which are supposed to sustain that doctrine, as the quotation from Blackstone, who says: "Water flowing is *publici juris*. According to Roman law, water, light and air were *res communes*, and were defined, things the property of which belongs to no person, but the use to all." Yet, after arguing to show that water is common property, it is also claimed that a stream may be absolutely appropriated by the first person who may wish to use it. In other words, that water, instead of being something which belongs to the community in common, as is argued at first, is a thing which belongs absolutely to him who first appropriates it, to the extent even, that

necessary for the purpose for which the appropriation is made, it may be completely consumed. Surely, the two propositions are as irreconcilably contradictory as any that can be named. As an illustration, it is argued that running water is like the air, to which certainly all have an equal right, and with which no one has the right to interfere to the injury of another. But in this case the right is claimed by Vansickle to deprive the appellant of the stream, which in the ordinary course of things he would be enabled to enjoy, and to appropriate it exclusively to himself. If running water be like the air, then surely no one has the right to interfere with it in its natural state to the prejudice of others. When positions so utterly contradictory are assumed, the real questions in the case are likely to be involved and obscured, rather than elucidated. Conclusions utterly unwarranted also appear to be drawn from the opinion already rendered, as for example, it seems to be claimed that the decision denies the right to use the water of running streams for irrigation. No such question was raised, considered, or even mentioned in the case, nor in anywise touched in the opinion; furthermore, there is no principle announced or case referred to in it, which in any way warrants such deduction.

Although satisfied that our former opinion is correct, beyond all question, still the principles involved being of such general interest and application, it is important that they should not be misunderstood. We have, therefore, given the matter further consideration; but in the very thorough research which has been made, we have found no legal principle or decided case which would authorize a reversal of our former conclusion, but rather at every step we have met with confirmation of its correctness, and an insuperable barrier to the adoption of any other rule. Before proceeding to an investigation of the legal questions really involved in the case, we may state, once for all, that the fact that the case is "of great interest to the public, whose rights" it is claimed "are seriously disturbed by the decision," is a consideration which, in very doubtful cases, may, nay perhaps should, have some weight with judicial tribunals. But that the interests of the public should receive a more favorable consideration than those of any individual, or that the legal rights of the humblest person in the state should be sacrificed to the weal of the

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many, is a doctrine which it is to be hoped will never receive sanction from the tribunals of this country. The public is more interested than in scrupulously protecting each individual in every right guaranteed to him by the law, and in so doing, not even the most trivial, to further its own interests. Every individual has the right, equally with the public at large, to a fair, impartial consideration of his case; for the rights of the public are no more sacred or entitled to greater protection in the courts than those of the individual—therefore, in actions between individuals, the consideration of public interest has weight only when there is grave doubt as to where the right lies. This doctrine, which might justify the courts in depriving a person of a civil right to the public good, might to-morrow force them to sacrifice to the clamors of a mob; which would deprive Haines of his right at one time, might operate against Vansickle at another. In this case we have no doubt whatever as to what should be the conclusion, the fact that it may injuriously affect the public has no weight in its consideration. Happily, however, we do not think the decision, if properly understood, will produce the general and disastrous results apprehended by counsel for respondent.

As the appellant here claims the water of Daggett creek as incident to the land patented to him by the United States, and it is admitted that he could get only such title and right as was vested in the United States itself, it becomes necessary to consider what is the nature of the rights of the federal government in public land; and we propose to show—1st, that it has the absolute and perfect title; 2d, that running water is primarily an incident to, or part of the soil over which it naturally flows; 3d, that the right of the riparian proprietor does not depend upon the appropriation of the water by him to any special purpose, but that it is a right incident to his ownership in the land to have the water flow in its natural course and condition, subject only to those changes which may be occasioned by such use by the proprietors above him, as the law permits them to make of it; 4th, that the government patented to Haines not only the land, but the stream naturally flowing through it; 5th, that the common law is the law of this state.

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to prevail in all cases where the right to water is based upon the absolute ownership of the soil.

It is a proposition universally admitted, that the United States is the unqualified proprietor of all public land to which the Indian title has been extinguished. Certainly there is none other who has a right to, or claim upon it, which in any way qualifies the right of the federal government. Although it has sometimes been suggested that the unoccupied lands belonged to the several states in which they may be located, the suggestion has never received the serious consideration of statesmen, or the courts of the country. On the contrary, it is the invariable language of the judges, that the unqualified right of property is in the United States. "The English doctrine in relation to real estate is, that there can be no adverse possession against the crown, nor against its grantee, until there be an entry after the grant. An entry on lands belonging to the crown is held not to be a disseizin, but a mere intrusion on the crown's possession. His possession is not thereby divested, but, in contemplation, still continues. The king not being disseized by the entry, his conveyance of the freehold is good, and his grantee is justified by virtue of it. The grantee succeeds to the rights of the crown, and cannot be disseized without another entry after the conveyance. The individual making the original entry acquires no new right by the conveyance, but only continues his old interest and remains an intruder still, liable to be sued in trespass. This is the doctrine distinctly stated in Bacon's Abridgment, 331; Title, 'Disseizin.' There can be no doubt but that the same principles are applicable to the government of the United States. It possesses the same degree of sovereignty and prerogative in respect to the public lands. In the right of *eminent domain*, it is the absolute and exclusive proprietor of all the public lands which it has not alienated or appropriated. It is seized of them to as full an extent as the British government can be of its domain. It cannot be disseized: no adverse possession is created by an entry on its lands. The entry is trespassous, and confers no right on the person making it. Possession thus acquired can never ripen into a right, nor authorize any defence against the government. The government may treat the person thus in possession as an intruder, and sue him in trespass.

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On the sale of the lands by the United States, the patent transfer to the purchaser the entire legal estate and seizin to as full an extent as the government held them." 2 Gilman, 652.

"It cannot be denied," say the Supreme Court, in *Irvine v. Marshall*, 20 How. 561, "that all the lands in the territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, in such modes and by such titles as the government may deem most advantageous to the public fisc, or in other respects may deem most politic." Respecting the right of the state to interfere with its title, or the mode of conveyance by it, the court further say: "But the property in question was a part of the public domain of the United States. Congress is invested by the constitution with the power of disposing of, and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. Now, if it were competent for a state legislature to say that, notwithstanding this, the title shall be deemed to have passed, the effect would be, not that Congress had the power of disposing of the public lands and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress in relation to a subject confided by the constitution to Congress only; and the practical result in this very case would be, the force of state legislation to take from the United States their own lands, against their own will and against their own laws. We hold the true principle to be this, that whenever the question in such a court, state or federal, is, whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States."

So Congress may prohibit and punish trespassers on the public lands. Having the power of disposal and of protection, Congress alone can deal with the title. And no state law, whether of legislation or otherwise, can defeat it. *Jourdan v. Barrett*, 4 H.C.

185. See also *Bagnell v. Brodnill*, 13 Peters, 450. "In this country," says Catron, J., in *United States v. Hughes*, 11 How. 568, "the lands of the United States lying within the states are held and subject to be sold (under the authority of Congress) as lands may be held and sold by individual owners or by ordinary corporations; and similar remedies may be employed by the United States as owners, that are applicable in cases of others. This we think is manifest." It not only has the sole right to sell, but it may like an individual lease any portion of the public domain. *United States v. Gratiot*, 14 Peters, 526. So the government is entitled to all the legal and equitable remedies with which any ordinary proprietor is vested for the protection of such property. It has been very frequently held that it might maintain trespass against persons intruding upon its land, should it choose to do so. *United States v. Gear*, 3 How. 20. "It would present a strange anomaly indeed," says Grier, J., (*Colton v. United States*, 11 How. 231) "if having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraint of the constitution upon their sovereign powers cannot affect their civil rights. Although as a sovereign the United States may not be sued, yet as a corporation, a body politic, they may bring suits to enforce their contracts and protect their property in the state courts, or in their own tribunals administering the same laws. As an owner of property in almost every state of the union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in *Dugan v. United States*, 'it would be strange to deny them a right which is secured to every citizen of the United States.'" Not only has it all the common law remedies for the protection of its property, but it may proceed summarily by military force to remove those who may be deemed intruders upon its property, (1 Opinions Attorneys General, 471) or the president may direct the marshal to remove such from lands belonging to it. 1 Woodbury & M. 82. These authorities illustrate the character of right or title which the United States has to the public land, and show very clearly that it is as absolute, perfect and complete as can be held or acquired by an individual. Indeed, it must necessarily

be so, for in this country all titles to land emanate from it, and no person can acquire a greater title than his grantor possessed. It is not to be inferred from what is said, that a person going upon such public land as is open to preëmption with the intention of acquiring title to it, can be deemed an intruder or trespasser, for in such case the acts of Congress authorize the entry. But that in nowise tends to show that the title of the government to the public land is not so absolute that it could prohibit all entry upon it, should it choose to do so. It might repeal all its preëmption laws and arbitrarily refuse to part with an acre of its soil ; prohibit any entry upon it, and maintain actions of trespass or ejectment against all intruders. Can it be said then, with any show of reason, that it has not as complete a dominion over its property as individuals or corporations? Being the absolute owner of the soil, the source of all title thereto, and entitled to all the remedies for its protection and preservation which are given to any individual owner, it certainly cannot be maintained that it is not equally entitled to everything which is naturally such an inseparable incident to the land, that it is frequently spoken of as a part of the soil itself. Such an incident is a natural water-course. It passes by deed of the soil without any mention, and forms as marked a feature of the land through which it passes as the trees upon it, or the vegetation which it nourishes. Nothing more readily recommends itself to the understanding than that an element which the laws of nature have connected with the freehold, and which, without any effort on the part of man, clothes it with refreshing verdure ; where without it there must be only forbidding nakedness ; creating fertility and productiveness where otherwise there would be only sterility ; at once administering pleasure and affording profit, is necessarily a part of, or an incident to his land. This is the natural effect of running water, independent of any use which may be made of it in administering to the immediate wants of man and beast.

How frequent it is that small streams of water are found to add immeasurably to the value of estates, even when no particular use is made, or intended to be made of them ! It is very seldom, indeed, that they do not, to some extent, enhance the value of real property, and they are frequently esteemed invaluable. Another

consideration which gives value to land through which certain streams are accustomed to flow, and which at common law is considered a valuable right, is the privilege of exclusive fishery, which, however, might be entirely destroyed if the stream were diverted, and the value of the land in some measure at least depreciated. "It was a settled principle of common law, that the owners of lands on the banks of fresh water rivers, above the ebbing and flowing of the tide, had the exclusive right of fishing as well as the right of property opposite to their respective lands, *ad filum medium aquæ*. And when the lands on each side of the river belonged to the same person, he had the same exclusive right of fishing in the whole river so far as his land extended along the same." 3 Kent, 411. For any interference with this right in any way, either by obstructing the passage of fish or otherwise, the law gives a right of action. Now can it be said, then, that a water-course is not essentially a part of the freehold itself? That it is so, the authorities bear abundant witness. We do not wish to be understood as saying that there is such an absolute property in the water that the whole stream may be destroyed by a riparian proprietor, so that others downstream will be deprived of it; but that it is an incident of his land to the extent that he has the right to have it continue to flow in its natural course, subject to such changes only as may be occasioned by such use of it as the law allows the various proprietors to make, as it passes along, and which will be hereafter more fully examined. In this sense only is the right to be understood, when spoken of in the authorities about to be quoted.

"Land," says Lord Coke, (4 co.) "in legal signification comprehendeth any ground, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furses and heath. *Terra est nomen generalissimum et comprehendit omnes species terræ*." "The nature of private property in a water-course," says Angell, (page 3) is derived as a corporeal right or hereditament from, or is embraced by, the ownership of the soil over which it naturally passes. The well known maxim, *cujus est solum ejus est usque ad cælum*, indicates that land in its legal signification has an indefinite extent upwards, and therefore it is that a grant conveys to the grantee not only 'the field or the meadow, but all growing timber and water

standing and being thereupon, and a stream of water is therefore as much the property of the owner of the soil over which it passes as the stones scattered over it.' " Again, (page 9) "The only mode by which a right of property in a water-course above tide water can be withheld from a person who receives a grant of the land, is by a reservation directly expressed or clearly implied to such effect. If the intention of the grantor is not to convey any interest in the water, or any portion of it, he can exclude it by the insertion in the instrument of conveyance of proper words for the purpose of doing so ; but, in the absence of such words, the bed, and consequently the stream itself, passes by the conveyance." If it be not an incident to the land, clearly it would not necessarily pass by such grant. "The uses of the waters of private streams," say the Supreme Court of Ohio, (10 Ohio, 297) "belong to the owners of the lands over which they flow. They are as much individual property as the stones scattered over the soil." Says Chancellor Kent, in *Gardner v. Village of Newburgh*, (2 John Ch. 166) "A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseized but by the lawful judgment of his peers, or by due process of law."

It is said in the note to *Ex parte Jennings*, 6 Cowen, 543 : "The general distinction deemed of so much excellence and importance by these learned judges, and which at this day no lawyer will hazard his reputation by controverting, is that rivers not navigable, that is fresh water rivers of what kind soever, do of common right belong to the owners of the soil adjacent, to the extent of their land in length ; but that rivers where the tide ebbs and flows belong of common right to the state ; that this ownership of the citizens is of the whole river, viz : the soil and the water of the river, except that in his river where boats, rafts, &c., may be floated to market the public have a right of way or easement." In *Wadsworth v. Tillotson*, 15 Conn. 372, speaking of the rights to a water-course, the Supreme Court say : "This right is not an easement or appurtenance, but is inseparably annexed to the soil, and is parcel of the land itself." Says Chief Justice Shaw, in *Elliott v. Fitchburg Railroad Company*, 10 Cushing, 193 : "The right to flowing water is

now well settled to be a right incident to property in the land.”

And again in *Johnson v. Jordan*, 2 Met. 239 : “ It is inseparably annexed to the soil, and passes with it, not as an easement nor as an appurtenance, but as parcel. Use does not create it ; and disuse cannot destroy or suspend it.” “ Water,” says Judge Murray, (8 Cal. 140) “ is regarded as an incident to the soil, the use of which passes with the ownership thereof.” Say the Supreme Court of North Carolina : “ The right is not founded in user but is inherent in the ownership of the soil, and when a title by use is set up against another proprietor there must be an enjoyment for such a length of time as will be evidence of a grant.” *Page v. Williams*, 2 Devereux & B. 55. But again : “ The common right here spoken of is not that existing in all men in respect of things *publici juris*, but that common to the proprietor of the land on the stream. And as between them, the use to which one is entitled is not that which he happens to get before another, but it is that which by reason of his ownership of land on the stream he can enjoy on his land and as appurtenant to it.” The Supreme Court of Vermont say, in *Davis v. Fuller*, 12 Vermont, 190 : “ The owner of the land has rights to the use of a private stream running over his land peculiar to himself as owner of the land, not derived from occupancy or appropriation, and not common to the whole community. It is the right to the natural flow of the stream. Of this right he cannot be deprived by the mere use or appropriation by another, but only by grant, or by the use or occupancy of another for such length of time as that therefrom a grant may be presumed.” “ As to all fresh water rivers, above the tide, the common law rule of property is the reverse ; it is presumed to be private, and in the absence of proof of any other right is always held to be in the owners of the banks, who are considered the grantees of the soil of the river’s bed, and of the use of the waters to the middle of the stream. Such property in small and wholly unnavigable rivers is strictly private and exclusive. It is as perfect as the right to the adjacent dry land, not only as Hale says ‘ in property but in use.’ ” Senator Verplanck, 26 Wend. 413.

Being an incident to the soil ; treated in all respects like other incidents to the land ; being, as some courts say, as much a part of

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the soil as the stones or the trees upon it, upon what principle it be contended that the United States, which is the source of the title, which has as complete and absolute an ownership to the water as can possibly be acquired, does not, like other owners, possess this most inseparable incident to it; that which is essential to it, and without which, in many cases, the land itself would have no value? If it has not the same right to running water that the proprietors of land have, then any individual may divert the water from land belonging to it, without regard to whether it may be necessary to make use of them at some future time; and so, in many cases, perhaps, render thousands of acres of land utterly worthless, which otherwise would be valuable and find a ready market. So that no person can get a better or more complete title than that which the United States itself has, no one claiming by patent under the United States possess the right, which is so universally conceded to all owners of land upon or over which streams of water flow, but which is confined to such rights as may be acquired by actual appropriation or use; which would be a condition of things existing in no other part of the world where the full title is in the individual. I have shown, the water naturally flowing through land is an incident to, or part of the land itself, whence the authority in a state may hold that such incident does not attach to the land belonging to the United States? It might as well be argued, and indeed it has been maintained with as much plausibility, that it has not the right of growing timber upon it, which is not more a feature of the soil than a natural water-course running through it. Having shown that it is an incident of the land through which it passes, or part of it, what becomes of the argument "that running water is not the subject of property except in its use; and use in the nature of things requires a person capable of enjoyment; and since the United States has not the capacity to use, it can have no interest or property in it." If a stream be an incident to the land, it can no more be diverted, simply because it cannot be preserved by the person owning the land, than he can be deprived of any other property for the same reason. The whole argument is a point evidently originates out of an utter misunderstanding of the law as meant by the court, when it is said that the riparian proprietor

“has no property in the water itself, but simply a usufruct while it passes along.” The very reason given for this statement shows that the riparian proprietor has a right beyond that which is claimed by counsel; it is this: that as each proprietor has a right to the flow of the stream through his land as it was wont to, as it is the common property of all the owners of the soil through which it passes, no one of them can have such a property in the water as will entitle him to consume or divert it all from those on the stream below him, as he might do if he had an absolute property in the water itself; hence the expression so often used. It is, however, never employed as limiting the entire right of the riparian proprietor to the mere use of water; he has another right, and one which is universally admitted; that is, the right to have the stream continue to flow through his land, irrespective of whether he may need it for any special purpose or not. He has the right to the natural benefit which a stream affords, independent of any particular use, for the fertility which its natural flow imparts to the soil. In other words, his right has a double aspect; first, the right of having the course of the stream continued through his land, which is absolute and complete, as against all the world; and, secondly, the right to make such use of the water, as it passes through his land, as will not damage those who are located on the same stream, and are entitled to equal rights with himself.

If this be not the character of his right, what is to be understood by the maxim so often quoted, and which lies at the foundation of water rights, *aqua currit et debet currere ut currere solebat*? This is substantially that no man has the right to divert a stream from its natural course; for to say that water should be permitted to run as it used to is a prohibition upon all to divert it from its course, and thus the very maxim shows the proprietors have the right to claim that the stream shall be permitted to run through their land in its natural channel, independent of whether they make any particular use of it or not. Suppose there be a waterfall or power upon a tract of land, and it may be supposed the land is valuable only for a mill-site, but is not presently used; will it be said that its whole value may be destroyed by the diversion of the water, or that a valuable mineral spring which is not used may be

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abstracted from it, and that the owner has no remedy simply because he had not appropriated it to some useful purpose when the diversion or abstraction took place? Indeed, the authorities are without exception, that the right to have the water flow in its accustomed channel does not depend upon the fact that any special use is or may be made of it by the proprietors; and no case, no *dictum* and no intimation of opinion to the contrary, when rightly understood, can be found in the books, except perhaps in the California cases, which we will show have no application whatever to this. It is said by Phear, in his work on Water-Courses, page 31, "that every riparian proprietor has a right whether he uses the stream or not, to have its natural conditions within his own limits preserved from sensible disturbances arising from acts on the part of other riparian proprietors, whether above or below, or on the opposite banks." "The proposition," say the court of king's bench in *Mason v. Hill*, 5 Barn. & Ad. 11, "that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in this sense: that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injury to real property, possession is a good title against a wrong doer, and the owner of the land who applies the stream that runs through it to the use of a mill newly erected or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. *But it is a very different question whether he can take away from the owner of the land below one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil even where unapplied, and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate, which in manufacturing districts particularly is much enhanced by the existence of an unappropriated stream of water with a fall within its limits, might at any time be taken away; and by parity of reasoning a valuable mineral spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another. We think this proposition has originated in a mistaken view of the principles laid down in the decided cases of Bealy v.*

aw, Saunders v. Newman and Williams v. Morland." Cres-
 1, J., in *Sampson v. Haelmott*, 1 Common Bench, says: "As to
 latter proposition, it appears to us that all persons having lands
 the margin of a flowing stream have by nature certain rights to
 the water of that stream, whether they exercise those rights or
 :." Said Lord Ellenborough in *Bealy v. Shaw*, 6 East. 208:
 The general rule of law, as applied to this subject is, that inde-
 ndent of any particular enjoyment used to be had by another,
 ery man has a right to have the advantage of a flow of water in
 s own land."

The Supreme Court of Massachusetts, in *Elliott v. Fitchburg
 Railroad Company*, say: "If the use which one makes of his right
 the stream is not a reasonable use, or if it causes a substantial
 nd actual damage to the proprietor below by diminishing the value
 f his land, though at the same time he has no mill or other work
 sustain present damage, still, if the party thus using it has not
 quired a right by grant, or by actual appropriation and enjoy-
 ent twenty years, it is an encroachment on the right of the lower
 oprietor for which an action will lie." "Every riparian propri-
 or," says Angell, § 134, "necessarily and at all times is using the
 ater running through it, in so far at least as the water imparts
 rtility to the land and enhances the value of it. There is, there-
 re, no prior or posterior in the use of the land, if each enjoyed it
 like from the origin of the stream * * *. The right is not
 nded in user, but is inherent in the ownership of the soil."
 e learned Chief Justice Ruffin, of North Carolina, in *Pugh v.
 Heeler*, 2 Dev. & Battell, 50, says upon this point: "The argu-
 nt of the counsel, however, assumes that the right to water can
 acquired only by use, and therein we think consists its error.
 e dicta on which he relies had reference to the cases of prescrip-
 e title, or where the party had only the rights of a possessor.
 t it is not true that the right to water is acquired only by its use,
 d that it cannot exist independent of any particular use of it.
 at doctrine is correctly applied to the air and to the sea, or such
 lies of water as from their immensity cannot be appropriated by
 ividuals, or ought to be kept as common highways for the con-
 nt use of the country and the enjoyment of all men. In such

cases particular persons cannot acquire a right, that is, a several and exclusive right by use or any other means ; but with smaller streams it is otherwise. They may still be *publici juris* so far as to allow all persons to drink the water and the like, and also so far as to prevent a person to whose land it comes from thus consuming it entirely by applying it to other purposes than those for which it is conceded to every one *ad lavandum et potandum*, as to divert or corrupt it." And the Supreme Court of New York, 10 Wend *Crocker v. Bragg* : " A person through whose farm a stream naturally flows, is entitled to have it pass through his land although he may not require the whole or any part of it for the use of machinery. Upon any other principle this right to the stream, which is as perfect and indefeasible as the right to the soil, would always depend upon the use, and a party who did not occupy the whole for special purposes would be exposed to have the same diverted by his neighbor above him without remedy, and which diversion by twenty years' enjoyment would ripen into a prescriptive right beyond his control, and thereby defeat any subsequent use." See also *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191. Such is the invariable rule, iterated and reiterated through all the books, and of which there seems to be no denial. These cases show that the owner of the soil can insist upon having the stream continue to run through his land as it was wont, independent of any special use of it. The fact as stated by Chief Justice Ruffin, that he is necessarily and at all times using the water running through his land, in so far at least as the water imparts fertility to the soil and enhances its value, is a sufficient user to entitle him to claim that he shall not be deprived of it.

These authorities completely overturn the argument for the petitioner in this case : for if the right be one inseparably incident to the land ; if the right to have the stream continue its flow in its natural channel does not grow out of or depend upon any special user ; or if, in the language of the cases, the owner of land on a stream is necessarily and at all times using the water running through it without any act of his own, by the fertility which its natural flow imparts to the soil, then it follows that the United States is as capable of enjoying the right as an individual, as it

land will be no less benefited by the natural flow of the stream than that of the citizen, nor would the diversion of it be any less injurious to it than it would to an individual who is making no special appropriation of it. Indeed, the whole argument is based upon the assumption that the riparian proprietor has no right to have a stream continue its flow through his land unless he has some special use to make of it, or has made some particular appropriation of it; whereas every case which has ever come under the observation of the courts, (and they are numerous) holds the contrary.

But we may admit, for the purposes of this case, in the language of the propositions laid down in the petition as the foundation of the argument, that "there is no property in running water, except that which is acquired by use, and that in such case there must be a person capable of using it, and a necessity for its use." It is assumed, as if it were a matter of course, that the United States is incapable of making use of the water of small running streams; and from that the conclusion is at once reached that it can have no right to it. The premise, it will be observed, is, not that the United States *has* not, but that it is *incapable* of making, use of a stream. Let us see how facts bear out this assumption. It is well known that the government of the United States has been the owner of and has run some of the most extensive manufacturing establishments in the country, and this, too, from its earliest foundation. As early as April, 1794, Congress passed an act providing for the erection and maintenance of arsenals. In accordance with this act the government secured title to certain land on Mill River, in Springfield, Massachusetts, and erected buildings suitable for manufacturing small arms, which have been occupied for that purpose ever since. Over fifteen hundred men are employed, and the production is often twelve thousand guns per month. The machinery of these extensive works is principally driven by the water power of Mill River.

Again, the federal government alone has the right to coin money. For the purposes of propelling the machinery of its mints, it might desire the use of any stream for water power or otherwise. That it has the right to erect arsenals or mints on any of the streams running through its land, is a proposition never before questioned; and

if it can do so, it can make use of the water, as can any private individual. Furthermore, the same constitutional power which authorizes the government to erect and maintain arsenals, as fully authorizes it to erect such other establishments for manufacturing clothing and equipments for its armies as it may deem proper. Indeed, such establishments of an infinite variety may be erected and operated by it, in connection with which the streams of water passing through its land might be of incalculable value. Nor has it ever been questioned that it had the right to be protected in the enjoyment of such right, should it choose to exercise it. *United States v. David Ames*, 1 Woodbury & Minot's R. 76, which was an action for an interference with its water power at Springfield. How, then, in the face of these well known facts, and of the admitted power of Congress to make like use of any stream in any part of its domain, can it be claimed it is *incapable* of making use of it; or, in the language of the petition, that "it cannot engage in crushing quartz, or other like business, and can therefore acquire no use in water for the propulsion of machinery." It must be borne in mind that the assumption is, and such is the argument, that the United States is *incapable* of making use of a stream of water—not that it is *not* making use of the stream in question. The fallacy of this argument is, we hope, sufficiently shown, and it is unnecessary for us to go further than to establish the untenableness of the precise position taken. The United States being *capable* of making use of a water-course at least for the purposes of manufacturing, possibly at *some* future time may have the necessity for such use; so there is *no* more reason why it cannot hold it for such possible future necessities than an individual. And we have shown it is uniformly held that the right of the individual is in no wise affected by the fact that he has no present use for the stream.

It is asked in argument, as a forcible illustration of the doctrine that the United States has no property in the water of a running stream, "how is it that a riparian owner upon navigable waters who has title from the government, may not use the water as it flows through his land in whatever manner he sees fit, even to the obstruction of navigation, the patent never making any reservation of an easement in favor of the public"? The answer is obvious,

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and the reason certainly should be known to counsel. It has been the uniform practice of Congress to declare the various rivers of its territories navigable, and that they "shall be common highways and free for all." Brightly's Digest, 105; 1 Statutes at Large, 491; 2 Id. 235, 279, 642, 666, 703; 3 Id. 349. Upon these statutes it has been always held that the riparian proprietors had not the right to interfere with the navigation of such rivers, because as decided by the Supreme Court of the United States in *Railroad Company v. Schurmeir*, 7 Wallace, 272, such laws must have the same effect as if they were incorporated into the patent issued to the proprietors on the streams.

But, it is argued if the United States ever had any right to the stream in question, it parted with it, and authorized the respondent here to make the diversion complained of, prior to the time it conveyed the land over which its natural course lay to the appellant, and consequently that the patent to Haines did not convey the right to the water. This result is arrived at in this way: the territory of Utah, of which this state formed a part, was authorized by Congress to enact appropriate legislation for the territory; but all the laws passed by the legislative assembly and governor were required to be submitted to it, and if disapproved they should be null and of no effect. It is said that the effect of this delegation of power was to make all the enactments of the legislature of Utah as authoritative and binding as if they originated with, and were passed by Congress itself; and therefore, that the United States authorized and sanctioned the diversion made by Vansickle, and that the government is bound thereby.

But if the United States is to be held bound by the acts of the territorial legislature of Utah as to its property, it would seem to be necessary to show that the acts in question were submitted to Congress and not disapproved by it, as such condition was imposed in the act organizing the territory. As between individuals, such showing might not be necessary; but here is a right claimed against the United States itself, by virtue of a legislative act of a territory. As the government creating that territory required all acts passed by its legislature to be submitted to Congress, it seems but reason-

able to require a person claiming such right to show that the acts under which he claims were so submitted before they could be considered its acts, or acts enacted by its authority; but no such showing is made here. And it is quite probable the acts in question were never brought to the attention of Congress.

But independent of this, there are two other conclusive answers to this position: first, the acts in no wise authorize the diversion of water as was done in this case; and second, if they did so, they were in direct conflict with that provision of the organic law of the territory which inhibited it from interfering with the primary disposal of the soil, and were for that reason utterly void. If the act referred to authorize a diversion of water from public lands, they are in the nature of grants by the government, which must always be construed most favorably to the government, and they pass nothing by implication. *Wilcoxon v. McGhee*, 12 Ill. 381, and cases there cited. It is incumbent then upon the person claiming such grant, to show clearly that the government intended to confer the right claimed, and that it comes strictly within the grant itself.

The first section referred to as authorizing the diversion of the waters of Daggett Creek by the respondent, reads thus: "The county court has the control of all timber, water privileges, or any water-course or creeks, to grant mill-sites, and exercise such powers as in their judgment shall best preserve the timber and subserve the interests of the settlements in the distribution of water for irrigation or other purposes. All grants held under legislative authority shall not be interfered with." Section 38, page 127, of the compiled laws of Utah. It will be readily perceived that this simply confers upon the county court the control of water-courses and the timber on the public land. It doubtless authorized that tribunal to grant the right to divert water, but nowhere intimates that any individual may make such diversion without the sanction of the court. Under this section, a person could only acquire such right from the county court, to which alone the right of controlling such matters is given by the section quoted. But it is not claimed for Vansickle that the court ever authorized him to make the diversion which he claims he has the right to make by virtue of this section; or that he had any prior legislative grant. The next section to which our

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attention is called, is Section 7, page 155, of the same volume, which reads: "That if any person or persons, after there shall have been a diversion of water lawfully made in any county or precinct in this territory for irrigation or other purposes, shall in any way infringe upon the rights of any person or persons, they shall be liable in an action of trespass to the parties damaged, and liable to be fined at the discretion of the court having jurisdiction." There can certainly be no two candid opinions as to the effect of this section, or the object sought to be accomplished by it. It grants no right of any kind to any one, but simply provides a punishment for the violation of rights supposed already to exist. Those who, by grants from the county court or legislature, were supposed to have obtained the right to divert water from the natural water-courses, could undoubtedly under this section maintain an action against any person interfering with such right. But before any such action could be maintained, it would be necessary first to show the *right to divert*; for this section does not pretend to grant such right. Can it, then, be claimed that this act amounts to a sanction by Congress of the diversion made by the respondent? Clearly not. Section 6, page 175, is with reference to surveying lands, and there is nothing in it respecting a diversion of water in any way. Section 1, pages 206-7, simply provides "that when water is taken from a stream by means of a ditch or sect which must cross any road, the person or persons so conducting the water shall be required to make, or cause to be made, a good and sufficient culvert, gravel ford, or bridge over such ditch or sect, and keep the same in repair where the same crosses any such public road or highway." What is there in this section authorizing a person who has no land on a stream, or no legal right to divert water from a stream, to make such diversion? Manifestly, it gives no sanction to any diversion by a person not already having the right to do so. It must be assumed that the persons, who are here required to bridge their ditches where they crossed any highways, had first the right to divert the water. Surely it grants to no one the right to divert a stream from its natural channel, but only regulates the manner of diversion by those who may already have the right to do it. And these are the acts of Utah, which it is said are as obligatory upon the United

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States as if they were enacted by Congress itself, and v
claimed grant to Vansickle the right to divert water from
public land to land occupied by him.

Again: the organic act of Utah declared that the
should pass no law interfering with the primary disposal of
the territory. Now, as we have shown that a natural water
right is an incident of the land, in fact a part of the soil, in the
of some of the cases, it is clear that no act of the legislature
of Utah would be valid which in any way attempted to confer
a right to the water of the streams on the public land. A
granting a right to divert a stream, would be of no more
importance than one authorizing the cutting of timber, or indeed, a
grant of title to a portion of the public land itself. It would be
an interference with the primary disposal of the soil. The diversion
of a stream from its natural course might more completely change the
character of the land through which its course lay, and be
of more value, than to strip it of its timber. Hence the one
would be no less an interference with the primary disposal of
the land than the other, and surely no one will contend that an
act of the legislature of Utah authorizing him to cut timber on the public
land would confer upon him any right as against the United States
or its grantee, or that such an act could be sustained for
long against the provision of the organic act referred to. It
will be claimed that, because the territorial legislature had
passed acts regulating the manner of holding and obtaining
possession of public land, therefore the United States is bound
by such acts, and could not afterwards interfere with the possession
acquired under or in accordance with them. The territorial courts
in conformity with territorial statutes, uniformly held that a
settler could hold as much land as he chose to enclose or cultivate
as long as he was always the rule until the surveys by the United States
of the land was thrown open to preëmption. But no one has
the hardihood to claim that the territorial statutes, customs and
decisions gave any right as against the preëmtor, or the United
States. The man who may have enjoyed and cultivated
his thousand acres was compelled to submit to the act of
Congress which only authorized him to preëempt one hundred and

of it. If such acts conferred no title as to the land itself, why more so to the water which is an incident to it? This view goes further than to show that the United States granted to Vansickle no right to the water of Daggett Creek—it negatives the idea that the general government has in any way indicated it to be its policy to permit the diversion of streams from their natural channel on the public land. Furthermore, it is clearly manifest from its preemption laws, that no such policy has ever been sanctioned by it. The only rights which can be acquired to the public agricultural lands are provided for by the preëmption laws, and the manner of obtaining such rights is specifically set out; and no right to, or interest in that character of land can generally be acquired from it, except by means of, and by pursuing the requirements of those laws. As it has specifically provided the course to be pursued, and designated the rights which will be recognized, it cannot be said that it has sanctioned any policy or means of acquiring such right, except those designated. But the right to divert water from a natural water-course, it must be admitted, creates an interest in the land from which the diversion is made in favor of him having the right. Angell on Water-Courses, Sec. 314. Further than this, the right to divert carries with it the right to go upon the land through which the ditch or flume is conducted, and upon which the dam, by means of which the diversion may be affected, is built, to keep them in repair.

Suppose, for example, that the dam built by Vansickle for diverting this water from the creek was on land purchased by Haines from the United States, and the ditch through which it was conducted ran through such land. Now if Vansickle acquired the right to divert the water as against the United States, he has the same right as against Haines; and that right necessarily gives him the privilege, at any and all times, when he may choose, to go upon the land of Haines, to keep his ditch and dam in proper repair—which, in itself, would be an interest in Haines' land. Angell on Water-Courses, Sec. 141; 2 Washburn on Real Property, 68. And thus, contrary to all preemption laws, and the manifest policy of the government as embodied in them, a person may get an interest in public land beyond his one hundred and sixty acres. All the acts of Congress ever adopted

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up to 1866, clearly show that it has never been the policy of the United States to sanction anything of the kind ; but on the contrary to ignore all rights to or interest in its land, except such as might be acquired by means of its own preëmption laws or other similar acts expressly conferring or confirming them—in other words, to keep the public land in such condition as that it can give to its patentee an absolute and perfect title, free from all easements and incumbrances of all kinds. No purpose of the general government is more perfectly manifest, from all the legislation of Congress, and decisions of its courts, than this. The diversion here complained of cannot, then, be said to be sanctioned by any policy of the United States. The act of Congress of July, 1866, if it shows anything, shows that no diversion had previously been authorized ; for, if it had, whence the necessity of passing that act, which appears simply to have been adopted to protect those who at that time were diverting water from its natural channel ? Doubtless, all patents issued, or titles acquired from the United States, since July, 1866, are obtained subject to the rights existing at that time ; but this is a different case—for if the appellant has any right to the water, he acquired it by the patent issued to him two years before that time, and with which, therefore, Congress could not interfere. But we do not understand it to be claimed that the act does directly affect this case, but that it is only referred to as exhibiting the policy of the general government. The answer is, that the policy began with that act, was never in any way sanctioned or suggested prior to the time of its passage, and therefore has nothing to do with this case.

Being the owner of the soil, and as such owner having an absolute right to the streams, and not having granted away any rights of water to Vansickle, nor authorized him to make the diversion complained of ; it becomes necessary to ascertain what right the United States had as against him for making the diversion, and what rights he acquired under the preëmption laws, for it is admitted that Haines received all the right which the United States itself had to convey. Unquestionably, the government, like an individual, has an equal right to protect its property from injury. Whilst it allows a citizen, or one who has declared his intention to become so, to enter upon one hundred and sixty acres of public land for the purpose of

preëmption, it allows nothing more. To the hundred and sixty acres occupied for the purpose of purchase from the government, the occupant, before he gets a patent, has a good right against all the world, except the government itself—he has not only the right to the land, but everything incident to it. But he has no right, as against the government, when occupying and improving one quarter section, for the purpose of preëmption or purchase, to enter upon another quarter section, to which he makes no claim whatever, and divert from it a valuable stream of water for the benefit of the land which he is claiming. As against all, except the United States, or a person who may have acquired some prior right, he may have it, for none other may be in position to complain. There is certainly no law of Congress authorizing the occupant of a quarter section to enter upon other public land and take from it that which may be its chief value. If each preëmptor is, by the preëmption laws, confined to the hundred and sixty acres which he occupies and intends to purchase, he cannot divert a water-course from other land which he does not intend to purchase or claim, for in that case he makes himself technically a trespasser.

Indeed, nothing is clearer than that an occupant of any portion of the public land has no more right as against the United States to enter upon other portions of it and divert from it a water-course, than he would if, instead of belonging to the United States, it were the property of an individual, for its title to the soil is as absolute and complete as the most perfect title which an individual can obtain, and it has all the remedies for protecting its property which the citizen has, and even more. If Vansickle had no right to enter upon the land of an individual for this purpose, he would have no greater right respecting land which is public. And as an individual would have a right to claim the return of the stream if diverted, so with the government. And all the right or title which the United States had in the land of Haines was conveyed to him by patent; and the patent necessarily carried with it the stream running through the land as an incident to it, together with the right to have it returned to its channel if diverted. Upon the latter proposition, we may be permitted to refer to two or three cases which we recall to mind at present. *Cook v. Foster*, 2 Gilman, 652; *Wilcoxon v.*

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McGhee, 12 Ill. 381 ; *Colvin v. Burnett*, 2 Hill. 620. In two cases were actions for flooding the land of the plaintiff by a mill-dam, which however was done prior to the purchase of the land by the government. The cases are clearly analogous; the right of the plaintiff for diverting a water-course from land or flooding it by reason of a dam are founded upon the same right, and are generally removed to the same character of action. In the case of *Wilcoxon v. McGhee* it appears that Wilcoxon erected his dam and mill on the land before acquiring a patent to it; this he afterwards purchased. The plaintiff, McGhee, did not acquire his title until long afterwards, and after Wilcoxon had enjoyed the privilege of flowing the land patented to him for some years. After obtaining his patent McGhee brought his action, and the court sustained it, saying in its opinion: "Although the general government in its liberal policy permits persons to enter upon, and subsequently to purchase, public land at the minimum price, yet it could never have had its intention in granting this favor to bestow also upon the purchaser the privilege perpetually to inundate and render valueless tracts of public land, by damming up a stream running through one which he might eventually purchase. The purchaser under such circumstances, pays nothing for the privilege of overflooding other lands; it is not a right necessarily or naturally appertaining to the land he purchases, and could never be presumed to have been in the contemplation of the government in making the grant. Every reason here stated applies with equal force to this case as to the case itself is a direct authority against the pretensions of Vansickle.

The case of *Colvin v. Burnett* was very similar, only the land was purchased from the state. The defendant claimed title by patent from the state, issued in 1807. There was a mill on the land, and a dam was afterwards built which set the water back so that another lot owned by the state was flowed. This latter lot some twenty years afterwards sold to the plaintiff Colvin. Colvin brought his action against Burnett, and the court unhesitatingly sustained it. "The question is simply," say the court, "whether by selling a farm lying below mine on a creek which happens to furnish a mill-site on the granted premises, I without one word

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grant the right to drown my farm above. No one would contend for such a consequence. The plaintiff's lot, as laid down on the map and located by other proof, extends to the creek, and he is entitled to go *usque filum aquæ* discharged of the artificial flow." Indeed, such is the uniform holding by all courts in analogous cases, respecting the public land. It follows, as the United States while owner of the land had the right to claim a return of the water of Daggett Creek to its natural channel, the same right was conveyed to Haines by the patent to him.

It is argued, however, that "Vansickle used the water adversely to Haines during the period prescribed by the statute of limitations, and acquired a right to the same by presumption of grant." Were it a fact, as assumed here, that Vansickle used the water for the period of five years adversely to the *title* of Haines, doubtless his right would be good, and Haines would not be able to maintain this action. But no rule of law is more familiar than that the presumption resulting from adverse holding or user is not a grant against any particular person, but against the title under which he holds. A five years adverse user of the water by Vansickle prior to the issuance of the patent to Haines would, under the laws of the state, deprive Haines of the right to maintain an action for its diversion, under the right which he may have acquired by prior appropriation of the water or occupancy of the public land; but when he obtains a patent from the government, he acquires a new title against which there is no prescription—against which Vansickle could hold nothing adversely until it come to Haines. The patent sweeps away all former titles, and confers upon the patentee as complete a title as the United States had. Suppose the rule here contended for were the law, it will be seen at once that the patent would in some cases fail to transfer the land to the patentee. As for example, A has a right to preëempt a certain quarter section of land; B enters and ejects him, and succeeds in holding the land adversely to him for five years before a patent is issued; A finally gets the patent, but under the reasoning in this case, B could defeat the patent by showing that he had held the land adversely to A for five years, and thus the United States would not have the power to grant the title to the person who under its laws might be entitled to it. The

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presumption respecting the adverse user of water and the adverse holding of land stands upon the same footing, and the reasoning which will sustain the one will likewise uphold the other. So it will be seen the adverse holding or user must be against the government itself if it can defeat or in any wise affect the title which is sought to be conveyed by patent. But it is always held, and no court has ever yet doubted the rule, that the title by patent cannot be defeated, or in any wise modified by state laws, or any adverse holding of the kind here relied on. In *Jourdon v. Barrett*, Howard, 184, the Supreme Court of the United States say upon this point, "Some stress in the argument was laid on the fact that the possession had been held of the land in dispute under Brangier's claim for more than ten years before the suit of Londry and Jourdon were brought, and therefore, the petitioners were barred by prescription and limitation in Louisiana. * * * To this ground of defense, it is a sufficient answer to say that Jourdon first acquired his interest in 1834, and Londry his, in 1836. Up to that time the lands they claim belonged to the United States as part of the public domain, and on which the defendant Barrett, and those under whom he claims, were trespassers; and that no trespass of the kind can give title to the trespassers as against the United States, or bar the right of recovery, *nor had the operation of time any effect as against Londry and Jourdon until they respectively purchased.* * * * Having the power of disposal and protection, Congress alone can deal with the title, and no state law, whether of limitation or otherwise, can defeat such title." See also, *Irvine v. Marshall*, 20 How. 558. It follows, that the time during which Vansickle diverted the water while the title was in the United States is not to be computed, for it could not affect the title acquired by Haines through the patent, and it is not averred in the complaint, nor is there any claim of a continuous adverse holding of five years since the patent was obtained; this point is therefore, untenable.

It is said the rule which is adopted in this case may be the rule of the common law, but that it is not applicable to our situation and therefore should not be followed. We have shown that a stream is an incident of the land through which it naturally flows; that it is in

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fact a part of the soil itself; that the right to have it continue to flow is as sacred a right as that to the soil itself; that being so an incident of the land, it necessarily passes by conveyance of the land; such being the law, we are unable to understand how or by what authority this court can say the patent of the United States does not convey as complete and perfect a title to its patentee in the state of Nevada as it does elsewhere. There is no rule within our knowledge which would justify a court independent of any common law principle in holding that the appellant Haines should not have the benefits of a stream of water which the paramount proprietor of the soil grants to him by its letters patent. It might as well be said that the courts can deprive him of the land itself by holding that it did not pass by the patent, as to rule so respecting that which is universally admitted and held to be an inseparable and valuable incident to it. There is no rule of law that would not be more applicable to our condition than that which would simply justify judicial robbery.

But perhaps it is the unwarranted conclusion drawn from our former opinion in this case, namely: that the water of a stream could not be used by the riparian proprietors for irrigation, which is thought to be inapplicable to the condition of things in this state.

To this it may be answered: first, that no such decision has been made, nor has anything of the kind been intimated; second, whatever the common law rule may be, whether applicable or not, it is made the law of this state, and is as binding upon us as any statute ever adopted by the legislature; and therefore we have no more power to annul or repudiate it, than we have to disregard a legislative act. The first legislature of the territory of Nevada, (Stats. 1861, page 1) declared that, "the common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory." Our state constitution adopted this, like all other laws of the territory, by Section 2 of the schedule, which declares that all laws of the territory of Nevada in force at the time of the admission of the state, not repugnant to the constitution, should remain in force until repealed by the legislature; hence, although the com-

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mon law might, in the opinion of judges, be inapplicable, still, if not in conflict with the constitution or laws of the United States, or the constitution or laws of Nevada, it must nevertheless be enforced.

But suppose this decision should necessitate the adoption of the common law respecting the manner in which running water may be used by those having the right to it; although it may operate unjustly in some cases, still, as a general rule, none more just and reasonable can be adopted for this state. It is a rule which gives the greatest right to the greatest number, authorizing each to make a reasonable use of it, providing he does no injury to the others equally entitled to it with himself; whilst the rule of prior appropriation here advocated would authorize the first person who might choose to make use of or divert a stream, to use or even waste the whole to the utter ruin of others who might wish it. The common law does not, as seems to be claimed, deprive all of the right to use, but, on the contrary, allows all riparian proprietors to use it in any manner not incompatible with the rights of others. When it is said that a proprietor has the right to have a stream continue through his land, it is not intended to be said that he has the right to all the water, for that would render the stream which belongs to all the proprietors of no use to any. What is meant is, that no one can absolutely divert the whole stream, but must use it in such manner as not to injure those below him. As the right is equal in each owner of the land, because naturally each owner can equally enjoy it, so one must exercise that right in himself without disturbing any other above or below in his natural advantages. "The right of flowing water," says Chief Justice Shaw in *Elliott v. Fitchburg Railroad Company*, 10 Cush. 193, "is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such just and reasonable use may often be

difficult question, depending on various circumstances. * * It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation. But this, we think, is an abstract question which cannot be answered either in the affirmative or negative as a rule applicable to all cases. That a portion of the water of a stream may be used for the purposes of irrigating land, we think, is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly obstruct or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably." This is the doctrine uniformly recognized both in England and the United States, and is the necessary result of the general principles universally recognized respecting running water. The following cases to a greater or less extent bear upon this point: *Mason v. Hill*, 3 Barn. & Ad. 305; *Id.*, 5 Barn. & Ad. 1; *Simpson v. Hadinott*, 1 C. B. (N. S.) 611; *Imberby v. Owen*, 6 Ex. 353; Phear on Rights of Water, 14 passim; *Wright v. Howard*, 1 Simons & S. 190; *Davis v. Fuller*, 1 Vt. 178; *Snow v. Parsons*, 2 Williams, 459; *Tillotson v. Smith*, 32 N. H. 90; *Gerrish v. Newmarket Man. Co.* 10 Foster, 10; *Blanchard v. Baker*, 8 Greenleaf, 253; *Ingham v. Hutchinson*, 2 Conn. 584; *Parker v. Hotchkins*, 25 Conn. 321; *Wadsworth v. Tillotson*, 15 Conn. 366; *King v. Tiffany*, 9 Conn. 161; *Litt v. Fitchburg R. R. Co.*, 10 Cushing, 191; *Tyler v. Wilson*, 4 Mason, 397; *Webb v. The Portland Man. Co.*, 3 Sum. 9; *Campbell v. Smith*, 3 Halstead, 140; *Pugh v. Wheeler*, 2 V. & Batt. Law, 50; *Canal Appraisers v. The People*, 17 Wend. 570; *Id.* 5 Wend. 423; *Rogers v. Jones*, 1 Wend. 237; *People v. Canal Appraisers*, 13 Wend. 355; *Ex parte Jennings*, 1 Cow. 518; *Gardner v. Trustees of Newburgh*, 2 John Chan. 3; *Conning v. Troy Iron Works*, 34 Barb. 486; *Id.*, 40 N. Y. 4; *Crocker v. Bragg*, 10 Wend. 260; *Arnold v. Foot*, 12 Wend. 330; *Commissioners of Canal Fund v. Kempshall*, 26 Wend. 404; *Chas. Davis v. Gitchell*, 50 Me. 602; *Heath v.*

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Williams, 5 Me. 602; *Heath v. Williams*, 25 Me. 209; *Cowen & Hill's Notes*, 376; *Plainliegh v. Dawson*, 1 Gill. 54; *Board of Trustees v. Haven*, 11 Ill. 554; *Moffitt v. Brewer*, 1 Green, (Iowa) 348; 3 Kent, 439.

Not only that, but its evident justness and propriety has recommended its substantial adoption as the law of France, by the code Napoleon, (Art. 640-641-644) which declares: "Celui qui a une source dans son fonds, peut en user à sa volonté, sauf le droit que la propriétaire du fonds inferieur pourrait avoir acquis par titre ou par prescription. Celui dont la propriété bord une eau courante, autre que celle qui est déclarée dependance du domaine publique, par l'article, etc., peut s'en servir à son passage pour l'irrigation de ses propriétés. Celui dont cetti eau traverse l'heritage, peut même en user dans l'intervalle qu'elle y, parcourt mais à la charge de la rendre, a la sortie de ses fonds, a sou cours ordinaire." And likewise in Louisiana Civil Code, Art. 657.

Whether the right to irrigate land can in this state be considered a natural want, is a point in no wise involved in this case, and which, therefore, does not call for decision. Counsel must certainly understand that the decisions in California and those formerly made in this state, wherein it was held that priority of appropriation gave a right to water, have no bearing whatever upon this case. Those decisions were made independent of any title to the soil—in fact, the only right which any person could at that time obtain was by actual appropriation—therefore, it was but simple justice and the dictate of common sense, that he who made the first appropriation should have the better right. But when one who has the absolute title to the soil claims water by reason of that title, as an incident to his ownership of the land, the question is a very different one. In this case he has the same right which the government of the United States has, as against any person diverting water from its land. Where there is absolute ownership of the land, as said by the Supreme Court of North Carolina, in *Pugh v. Wheeler*, there is then no prior or posterior in the use, for the land of all enjoyed it alike from the origin of the stream, and the title of all persons who claim by patent is as old as the title of the United States itself.

The common law rule is acknowledged to be the law in California.

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every cases relied on as holding differently, and was not applied because the title to the land was in the government. Thus *n v. Phillips*, which is one of the first cases upon the question of prior appropriation is adopted, because of the absence of any ownership in the soil by either of the parties, as is clear from the opinions. It is said: "It is insisted by the appellant that in this case the common law doctrine must be invoked, which prescribes that a water-course must be allowed to flow in its natural channel. But upon examination of the authorities which establish that doctrine, it will be found to rest upon the fact of the equal rights of landed proprietors upon the stream, the principle being, both at the civil and common law, that the owner of the land on the banks of a water-course owns to the middle of the stream and has the right by virtue of his proprietorship to the use of the water in its pure and natural condition. In this case, therefore, where the property either of the state or of the United States, is not necessary to decide to which they belong for the purpose of this case. It is certain that at the common law the diversion of water-courses could only be complained of by riparian owners who were deprived of the use, or those claiming directly under

Then the court goes on to show that as the parties were owners of the soil, the common law rule did not apply. So in *Crandall v. Wood*, 8 Cal. 141, Judge Murray, after stating the common law rule as to the rights respecting running water, says, to say, that "Having thus stated the fundamental principle upon which this right is founded, it is evident that the only difficulty in this case arises — first, from the fact that the defendant is not the owner of the fee in the land, but that title to it is in the government of the United States." The judge then quotes the language from *Irwin v. Phillips*, and the whole case shows that the decision would have been different if the respective parties had been the owners in fee of the lands through which the stream flowed. Without special quotation from the decisions of this state, it is sufficient to say, that a reference thereto will show that the greatest care has invariably been taken to prevent misapprehension on this point. See *v. Simpson*, 2 Nev. 274; *Ophir S. M. Co. v. Carpenter*, 5 Nev. 534; *Covington v. Becker*, 5 Nev. 281; *Proctor v. Jen-*

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nings, 6 Nev. 83. That this is the reason upon which the California cases and those formerly rendered in this state is based, and that the common law was not applicable, because of the fact that the person claiming had not the title to the land, is so familiar to the profession that it is incomprehensible how they can be referred to as authority in a case like this, where the absolute title to the land is in the parties, and the appellant is claiming the right to the water, not as was done in the California cases, by virtue of prior appropriation, which was the only right upon which it could then be claimed, but by virtue of his patent; by virtue of having the complete right which the United States itself had. It will be readily perceived, then, that the cases referred to have no pertinence whatever to the question involved in this case.

Being fully satisfied with the former opinion, we must deny a rehearing.

By GARBER, J., concurring:

If I believed that a re-argument could throw any additional light on the questions involved, I should unhesitatingly advise the granting of the petition. Because I feel sensibly that the decision we have been compelled to render, in obedience to the law as it is written, and which it is our function to declare and not to alter, may work great hardship in this particular case; and, as a general rule applicable to a certain class of patents, may disappoint expectations long, though erroneously, considered by the public well founded. Unfortunately, this is not a case where such common error can be said to have made itself law; and after as thorough an investigation as I am capable of making, I feel constrained to concur in the position so fully elaborated by the chief justice that on every point essential to the case of the petitioner, not merely the weight of authority, but all the authorities, are against him. Against a clear and explicit rule of law, no arguments from inconvenience, however forcibly urged, can prevail. As to the existence and extent of the right of a riparian proprietor to use the water for irrigation, I intimate no opinion.

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ADRIAN C. ELLIS *et al.*, APPELLANTS, v. WASHOE
COUNTY, RESPONDENT.

EMPLOYMENT OF ATTORNEYS BY COUNTIES. County commissioners have authority to employ attorneys to protect the interests of their county in litigation affecting it, and to bind their county by contracts for the payment of such attorneys' fees.

POWER OF COUNTY COMMISSIONERS TO EMPLOY ATTORNEYS. Section 8, subdivision 12, of the statute concerning county commissioners, (Stats. 1871, 48) giving them power "to control the prosecution or defense of all suits to which the county is a party," embraces the power to employ and pay counsel (besides the district attorney) not only in suits in which the county is a party on the record, but in those in which it may be a party in interest.

APPEAL from the District Court of the Second Judicial District,
Washoe County.

This was an action by A. C. Ellis and S. D. King, composing the law firm of Ellis & King, to recover their fees for professional services in the case of *Hess v. Pegg et als.*, reported *ante*.

Ellis & King, for Appellants.

By the Court, LEWIS, C. J.:

It is alleged in the complaint filed in this action, that the plaintiffs are associated together in the practice of law, and that they are duly licensed so to practice both in the federal courts and those of the state; that on the twenty-sixth day of March, A. D. 1871, they entered into a contract with the defendant, whereby they agreed to render and perform for it certain legal services; and the defendant undertook and promised to pay therefor the sum of one thousand dollars in gold coin of the United States; that in pursuance of such agreement, the plaintiffs, between the twenty-sixth day of March, A. D. 1871, and the third day of May of the same year, defended a certain suit in the district court of the second judicial district of the state of Nevada, in and for said county of Washoe, wherein Lewis Hess was plaintiff, and Charles W. Pegg *et als.* were defendants, and upon appeal from said court to the Supreme Court of the state, which action was instituted to test the validity

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of an act of the legislature of the state of Nevada, entitled "an act to change the county seat of the county of Washoe," approved February 17th, 1871, removing the county seat of said county from the town of Washoe City to the town of Reno in said county, in which action the defendant was directly interested; that the services so rendered by the plaintiffs were all that were to be performed by plaintiffs under said contract; that the said services were reasonably worth the sum of one thousand dollars in gold coin of the United States; that the defendant, although often requested so to do, has hitherto failed and refused, and still fails and refuses to pay said sum of one thousand dollars, or any part thereof. It is also alleged that the plaintiffs presented their claim for the services so rendered to the board of said county commissioners for allowance on the fourth day of May, 1871, and that on the same day the said board allowed and ordered paid the whole thereof, to-wit: one thousand dollars in gold coin; that afterwards, but before the bringing of this action, the county recorder and *ex officio* county auditor of said county, received the order of the said board of commissioners allowing said claim and ordering the payment thereof; and that said recorder then and thereupon refused to audit and allow the same, but rejected said claim, and still refuses to audit and allow it; that afterwards, and before the bringing of the suit, said order was presented to said board of county commissioners, with the refusal of said auditor to audit and allow the same, endorsed thereon; that said board afterwards failed and refused, and still fails and refuses to order the issuance of the proper warrant for said claim, or the payment thereof. Judgment is prayed for the sum of one thousand dollars.

The complaint was demurred to upon the grounds that it did not state facts sufficient to constitute a cause of action; the demurrer sustained and judgment for costs rendered against the plaintiff.

It is quite evident if the county commissioners had the power to bind the county by a contract such as that counted on in the complaint, the demurrer should not have been sustained; for a contract otherwise complete and valid is set out, and the breach properly alleged. The only question to be determined then is, whether the commissioners possessed the authority so to bind the county. This is

ular power is not given in express terms, but the power "to
l the prosecution or defense of all suits to which the county
rty," which is given in Subdivision 12 of Section 8, Laws of
clearly embraces the power to employ counsel to protect the
t of the county. Litigation can only be controlled by means
neys having the authority to appear in the courts; hence, to
all effect to this power, the commissioners must in the very
have the power to employ counsel. Nor is it any answer to
at the law designates and provides an attorney for that pur-
the district attorney; for it is not unfrequently the case that
y be unable to attend to the business of the county, or its
ts in some particular suit may be of such magnitude that
istance of other counsel would be very desirable, or possibly
nsable. Upon a similar statute, and under like circumstances,
preme Court of California has held, in conformity with these
first in the case of *Smith v. The Mayor of Sacramento*, 13
31, and again in *Hornblower v. Duden*, 35 Cal. 664. In
ter case, the court say upon this question: "The point as
power of the board to employ other counsel than the district
y is answered by the case of *Smith v. The Mayor of Sac-*
o, and nothing need be added to what was there said.
the power is not expressly conferred, yet it is obviously em-
in the general power to control the prosecution and defense
suits to which the county is a party—which we conclude to
not only suits to which she is a party upon the record, but
s in the prosecution or defense of which she has, or is sup-
o have, an interest." So we construe the act of this state
er the power, not only to control all suits to which the
is a party on the record, but to such as it may be a party
rest merely. Such was manifestly what the legislature
by party to a suit.

see no other possible objection which could be made to the
int. The demurrer should, therefore, have been overruled,
e court erred in sustaining it.

ered accordingly.

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MYRON C. LAKE, APPELLANT, v. THE VIRGINIA AND
TRUCKEE RAILROAD COMPANY, RESPONDENT.

LAKE'S TOLL BRIDGE FRANCHISE OVER TRUCKEE RIVER. The Utah statute authorizing Myron Lake to construct a toll road and bridge at a certain point across the Truckee river, and prohibiting the building of any other bridge within a mile thereof, (Stats. 1862, 19) does not prevent the building at the same point of a railroad bridge which is to be used exclusively for railroad purposes.

CONSTRUCTION OF FRANCHISE GRANTS. Any ambiguity in the terms of the grant of a franchise must operate against the grantee and in favor of the public.

RAILROAD BRIDGE NO INFRINGEMENT OF TOLL BRIDGE. A grant to a railroad company to cross a river with its railway, and transport passengers thereon in the ordinary course of its business, is not an infringement of a previous grant of the exclusive right of a toll bridge over such river.

RAILROAD IMPROVEMENTS FAVORED BY LEGISLATION. In view of the territorial and state legislation in reference to railroads, it would require the clearest expression of legislative intention to uphold the grant of such an exclusive franchise of a toll road or bridge over a river, as would prevent railroad extension and improvement in the same direction.

RIGHT TO TOLLS ON TOLL ROADS AND BRIDGES. A toll road and bridge franchise, which gives the right "to charge and collect from persons traveling over and along said road such rates of toll," &c., is not interfered with by a railroad company running alongside of it; for the reason, among others, that it does not carry persons in such a manner as to interfere with the collection of tolls from "persons traveling over and along said road."

"RAILROAD BRIDGE" NOT AN ORDINARY "BRIDGE." The crossing of a river by a railroad track on piers, or what is known as a "railroad bridge," is neither a bridge, a ferry, nor any public means of crossing by any ordinary method of travel, such as is contemplated in ordinary legislation concerning toll roads and bridges.

APPEAL from the District Court of the Second Judicial District,
Washoe County.

The facts are fully stated in the opinion.

Ellis & King and *R. M. Clarke*, for Appellant.

I. If Lake's right or franchise could be made exclusive as to wagons and horses, or the ordinary primitive modes of transportation, so also it could be as to railroads or any of the improved modes

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portation. *Livingston v. Van Ingen*, 9 John. 507 ; *Ogibbons*, 9 Wheaton, 1 ; *Livingston v. Fitch*, 4 Sandf. 492 ; 469 ; 2 Conn. 484 ; 7 Conn. 28 ; 16 Conn. 149 ; 22 Cal. Wend. 444 ; 20 Johns. 100 ; 4 Pick. 180 ; 2 McLean, 7 Conn. 93 : *Binghampton Bridge*, 3 Wall. 51.

The Utah act, when its requirements had been complied with, became an executed grant ; and any law of the state of which would operate against such grant, or to the destruction or infringement of the franchise, is unconstitutional and void. *Sh. 136* ; 7 Cranch, 164 ; *People v. Platt*, 17 Johns. 195 ; *Ston*, 518, 444 ; 1 Paige, 102 ; 17 Conn. 40. Such right of franchise could only be taken for a public use in the exercise of it of eminent domain upon compensation.

The structure of the defendant, which is being used as a bridge for the transportation of locomotives, trains, persons and property, is a "bridge" within the meaning of Section 3 of 17 Conn. 40. Perhaps, before railroads were in use or when "any other bridge" was forbidden by law to be constructed or used within certain designated limits, it was with some reason decided that the law-making power, thus granting new rights, could not have intended to include the new and extended mode of public conveyance called a railroad ; but in the present case, the exclusive right was granted in the midst of a railroad, when the railway was one of the most ordinary means of transportation.

If the structure which is being used be not a "bridge" in the sense of the statute, it certainly is a "public means" for conveying across said river of persons and property, which is forbidden under the law.

The fact that the structure complained of is a part of a railroad, can make no difference. The law would be the same if the railway was only one quarter of a mile in length, and designed only to transport persons and property across the river for the purpose to avoid and destroy the franchise of defendant. The fact that persons and property carried on the railroad come from greater or less distances, is immaterial.

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R. S. Mesick and W. S. Wood, for Respondent.

I. The structure complained of having been finished, ready to be used in connection with the railroad and connecting with the Central Pacific Railroad, the defendant is authorized by act of congress to use its road and the structure in question in spite of the Lake Act. 14 U. S. Stats. 66; *W. U. Tel. Co. v. A. & P. S. T. Co.*, 5 Nev. 102.

II. The structure is not such in character or purpose as to constitute an infringement of the plaintiff's right. *Bridge Proprietors v. Hoboken Co.*, 1 Wallace, 116; *Thompson v. N. Y. & Harlem R. R. Co.*, 3 Sandford, 625; *Mohawk B. v. Utica & S. R. R. Co.*, 6 Paige, 554. It is not the thing which, in contemplation of law, was intended to be prohibited by the Lake Act. It is not a bridge; nor a ferry; nor a ford; it is not a thing which the public is entitled to use, as a means of crossing the river. It is not a public means for the conveying across said river of either persons or property, within the meaning of the act, which only contemplates public means of conveying persons and property, according to the ordinary meaning of the language.

III. While the railroad vehicles are public, like the teams and stages of other common carriers engaged in a business to which the plaintiff's franchise does not relate, the railroad bridge is private, and not public, as the plaintiff's is and is required to be, and the railroad bridge is incapable of interfering with the plaintiff's right, and so not unlawful.

IV. Is it possible that the railroad company can be enjoined from crossing on its own bridge, whilst the plaintiff does not provide one which it can use? By maintaining a foot-bridge he cannot prevent the public from crossing their teams; by providing bridge for light carriages, he cannot prevent heavy freight wagons from crossing; by providing for all these, he cannot prevent trains of cars, now the usual vehicles for transporting freight and passengers, from crossing; and if he says he is not obliged by charter to furnish crossing for trains because they were not in use at that place when his charter was granted, we answer that the

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t included within the meaning of the act as to his priv-

e Court, WHITMAN, J.:

lant sought in the district court an injunction, "restrain-
ndant (respondent) * * * from conveying across Truckee
ithin one mile on either side of plaintiff's (appellant's)
either persons or property, by any bridge, ferry, or other
means of conveying persons or property," and for general
From an order refusing the injunction, this appeal is taken.
llant bases his claim upon a grant of the territorial legisla-
forth in his bill, the substance of which it is better to
ere, as it will be necessary in the course of this opinion to
ference to its different features, and such will thus be more
le:

act to authorize Myron Lake, his heirs and assigns, to con-
toll road. * * * * *

tion 1. That Myron Lake, his heirs and assigns, be and
by authorized to construct and maintain a toll road from
tion House in said Washoe County, running thence north-
ssing the Truckee river at what is known as Fuller's
* * * for the period of ten years from and after the
of this act, and the right of way over and along said route
y granted. * * * * *

. 2. That it shall be the duty of said Myron Lake, his
l assigns, to construct with all reasonable dispatch, a good
th substantial bridges and culverts, over and along said
or the safe and speedy transportation of persons and
. * * * * *

. 3. That it shall be unlawful for any other person or
to have, keep, maintain, or construct, over or across said
the point thereon above mentioned, or within one mile on
de thereof, any bridge, ferry, or other public means for the
ig across said river of either persons or property.

. 4. That said Myron Lake, his heirs and assigns, shall
erty to charge and collect from persons traveling over and
id road such rates of toll as may be fixed." * * *

862, 19.

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Now upon this basis appellant urges that for ten years from date of the statute quoted, he has an exclusive franchise in conveying, or furnishing the means of conveyance for persons and property across the Truckee River at the specified point, and one mile on either side thereof, which should be protected in against infringement. It may be admitted that the remedy is the correct one for the alleged injury; that the grant is exclusive, and that to interfere with it by legislative action, would be to impair the obligation of a contract. *The Binghampton* 13 Wallace, 51.

The sole question then in this case is of infringement. The facts pleaded and admitted are, that respondent is a legally incorporated company, under the general railroad law of this State (Stats. 1864-5, 427) which gives among other privileges the right to construct the road "across, along, or upon, any stream or water-course," &c.; that it is engaged in building a railroad from Virginia City in Storey County, through Ormsby and Washoe counties, to connect with the Central Pacific railroad at Reno in Washoe County; that its entire route is surveyed, and it is built and in operation from Virginia City to Carson City; and it was, at time of suit brought, engaged in building the road at the point of junction at Reno, toward Carson City; that such road crosses Truckee river, within a mile of appellant's bridge; and to cross such river what is known as a railroad bridge is necessary; that this is "intended to be nothing more than a railroad bridge, a part of its said railroad, laid upon piers raised upon the banks and in the channel of said river, and properly supported to support said track, and is not intended to be in any way capable of being used for the passage of persons, animals or teams or property except in and by the locomotive and railroad cars of this defendant (respondent) run exclusively upon its said railroad, and will not be used in crossing persons or teams or property over said river for compensation or toll, or otherwise than for the transportation of passengers and freight across said river, in and by the said locomotives and cars, and will not be used in any way to interfere with the privileges of the plaintiff (appellant) in respect of his bridge and road, or for transporting over said river any other

than the said locomotives and cars of this defendant, (respondent) regularly run upon its said railroad in the ordinary course of its business"; "that the contemplated running of the defendant's (respondent's) cars over its railroad and bridge described in complaint and answer, will decrease the tolls on plaintiff's (appellant's) bridge in the sum of one dollar per day and more; that plaintiff (appellant) has not, and never had any bridge across Truckee river, over which railroad cars or locomotives could run."

Upon these facts and the statute is to be decided the issue. The rule of construction of similar acts is so concisely stated by high authority in England, and these United States, that it may not be amiss to quote it. "This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases is now fully established to be this—that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act." *Canal Co. v. Wheely*, 2 Barn & Ad. 792.

"But the rule of construction in cases of this description as recognized by this court in the case of the *Charles River Bridge* and *The Warren Bridge*, 11 Pet. 420, is this: That any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable interpretation, contrary to the obvious intention of the grant. It must be fairly examined and considered, and reasonably and justly expounded. But if upon such an examination there is doubt or ambiguity in its terms and the power claimed is not clearly given, it cannot be exercised. The rights of the public are never presumed to be surrendered to a corporation unless the intention to surrender clearly appears in the law." *Perrine v. Chesapeake & Del. Canal Co.*, 9 How. 180.

It would seem under the facts and the law, that there could be little doubt of the correctness of the order of the district court appealed from; but as the opposite view is pressed with great energy,

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and it is insisted that the authorities relied on by respondent are not in point, it may be well to examine the current of decision upon similar statutes in this country, and see whither it tends.

As early as 1837, it was held in New York, that if a grant had in terms given to a corporation the exclusive right of erecting a toll bridge across the river at Schenectady, a subsequent grant to a railroad company to cross the river with their railway, and to transport passengers thereon in the ordinary course of their business in the conveyance of travelers from one place to another, would not be an infringement of the privileges conferred by such prior grant; as the railroad bridge would not be a toll bridge, within the intent and meaning of the grant to the bridge company. *The Mohawk Bridge Co. v. The Utica and Schenectady R. R. Co.*, 6 Paige, 154. Appellant argues that the reason for the decision was that the legislature, in making the grant to the bridge company, could not have intended to prohibit a railroad bridge, as at that date such a structure was unknown; and that the reason failing in this case, the authority fails also; of that, further on.

The next case in New York seems to put the decision upon a broader ground. An injunction was denied to the Harlem Bridge company which claimed under an act, providing among other things "that it shall not be lawful for any person or persons whatsoever, to erect any other bridge over or across the Harlem river to Morrisania, or to keep any vessel to ferry any person across the river, from Morrisania to Harlem, except for the private use of the inhabitants of that township." A private bridge was built, which was afterward purchased by the railroad company; and it was held that such company had the right to use the same for all legitimate railroad purposes—the court saying: "It was argued on the part of the defendants that the railroad bridge used merely for its appropriate purpose of passing their locomotive engines and trains of cars across the Harlem river on their way from the City of New York to their various stopping places in Westchester county, does not violate, infringe or interfere with the franchise granted to the Harlem Bridge Company by the Act of 1790. There is undoubtedly much force in the argument. The railroad bridge as such is incapable of being used for the passage of any vehicle, animal, or

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not passenger, for whose passage the complainants are entitled to receive toll. The fact that the railroad bridge, as built for the private use of the inhabitants of Morrisania, may be crossed by such vehicles, &c., does not affect the consideration of this point. On the other hand, the complainants' bridge has not the capacity to pass over the Harlem river any of the railroad company's engines, or their trains or cars drawn by such engines. And if the complainants were to lay down a suitable railway track, and strengthen their bridge so that the engines and trains of the defendants might pass it, there is nothing in their charter which would warrant them in exacting toll from the defendants. This demonstrates that the franchise granted to the defendants is not the same as that granted in the complainants; nor is there such a similarity between them as renders one an interference with the other, in the sense in which a new bridge or a ferry interferes with a prior one established at the same point." *Thompson v. The New York and Harlem R. R. Co.*, 3 Sandf. Ch. 625. See also *Akin v. Western R. R. Corporation*, 20 N. Y. (6 Smith) 370.

In North Carolina, where a person held a ferry under the proviso that it should not be lawful for any person whatever, to keep any ferry, build any bridge, or set any person or property over the river for fee or reward, within six miles of the bridge," it was said by the court: "The broad question is, had the legislature power to authorize the company to build a bridge across the northeast branch of the Cape Fear river, in *continuation and as a part of* the railroad, charging for persons and property carried along the road, and making no charge for persons or property set over the river as an act of itself, i. e., (making no separate charge for setting persons or property over the river, and making no higher charge on that part of the road by reason of the river) notwithstanding the franchise claimed by the plaintiff under the act of the governor, council and assembly of the colony of North Carolina, in the year 1766"? This question was decided in the affirmative, upon the ground that the intent of the parties must be deemed to be confined to the means known and in use at the time of the contract; and on a further constitutional ground—the court saying: "We are now to decide whether the 'franchise' or 'monopoly' granted

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to Herron, his heirs and assigns, by the colonial government, entirely abolished by the declaration of rights and the formation of the state government, or not. It may be that the franchise still exists, so far as it confers a right to keep up a bridge and to toll, and possibly so far as to prevent any other person from 'settling any person or thing over the river in the way of a ferry or an ordinary bridge'; that is a different question; we decide now, notwithstanding the colonial act of 1766, the legislature in 1866 had the power to grant to the defendants a right to construct a railroad, and in doing so, to cross the south (north?) east branch of Cape Fear, and to consider 'the transit' over the river as a part of the road." *McKee v. W. & R. R. Road Co.* Jones' Law, (N. C.) 186.

In New Hampshire, it was incidentally, but apparently suggestively remarked, without any decision, none being called for in the then state of the case, and none being after reported. "It is evident, that in order to determine the rights of parties, it may be necessary to inquire whether the bridge proposed to be erected by the respondents be a violation of the orator's charter, and the exclusive privileges conveyed thereby. What kind of travel is calculated to accommodate, how far the purposes it is designed to accomplish are the same with those intended by the orator's bridge are matters which we may be called upon to examine. And on this view it is by no means clear that we may not find it proper to consider the allegation that railway communications were not brought into use until after the grant to Hale. Does a railway bridge subserve the purpose for which the orator's bridge was erected? They are both bridges, that is, both are structures of wood, iron and stone, crossing the river. But, though generic in the same, the specific difference between them may be very great so great that one may not be considered as infringing upon the province of the other." *Tucker v. The Cheshire R. R. Co.* N. H. 1 Foster, 29.

The digest has it that the Supreme Court of Georgia held, "that the franchise granted to the railroad company was not the same as that conferred on the first grantee, nor so similar as to be deemed an infringement upon the prior charter, in the sense in which a

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bridge or ferry interferes with one previously established at the same point; and that no injunction will be granted, or compensation decreed, by way of damage in such a case." This, upon facts stated as follows: "The legislature of 1806 authorized Joseph Hill to erect a toll bridge across the Great Ogeechee, at a particular place; and the act provides that it shall not be lawful for any one to erect any other bridge within five miles above or below said bridge. The toll bridge was built, and had been kept up ever since. In 1847 and 1851, the legislature authorized the construction of a railway across the same river, between Savannah and Albany, which would necessarily cross near the said toll bridge, and which was actually carried across, within a mile and a half below the same." *McLeod v. S. A. & G. R. R. Co.*, 25 Ga. 445; Dig. 71, Tit. Bridges.

The report, unfortunately, is not in the library, but the quotation is probably correct, being in unison, so far as ascertained after a tolerably thorough research, with the decisions or intimations of all courts of last resort in this country in which the question has been mooted, save one.

The most carefully considered case in the books is that of *Bridge Co. v. Hoboken Land and Improvement Co.* This is first found in 2 Beasley N. J. Ch. 81, where the decision is by the chancellor, who holds that plaintiffs had, by contract with the state, the exclusive franchise of maintaining bridges and taking toll over certain rivers, and that such contract was within "the protection of the constitution, which declares that no law shall be passed impairing the obligation of contracts. But the construction of a viaduct over said river (*sic*, meaning the Hackensack) for a railway, to be used exclusively for the passage of locomotives, engines, and railroad cars, is not a bridge within the prohibition of said charter."

The decision of the chancellor was approved by the court of errors and appeals, (*Ib.* 503) and was finally reviewed and affirmed by the Supreme Court of the United States.

The several opinions are exhaustive of the subject, in its every phase, but somewhat too lengthy for quotation entire; and any more extended citation than will hereinafter be made is unnecessary, as the essence may be found in the few closing words of Mr. Justice

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Miller, speaking for the court last named. "We are, however, satisfied that sound principle and the weight of authority are to be found on the side of the judgment rendered by the New Jersey court of errors and appeals in this case; and accordingly the judgment is affirmed." *Bridge Proprietors v. Hoboken Co.*, Wall. 116.

Opposed to the cases hereinbefore cited, is that of the *Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Co.*, 17 Conn. 40, which touches every point made in those cases save that of the neglect or inability of the ordinary bridge proprietors to furnish the necessary facilities for railroad travel. The New Jersey court of errors and appeals criticises this last named case almost unmercifully; but whether the criticism be just or not, still this one decision could not be allowed to override all the others unless it be so evidently correct as to make it necessary to take an absolutely new departure upon a question which may properly be considered to have been settled for more than thirty years in the United States.

So far as the cases go upon the reason that legislatures could not have intended to bar railroad bridges, or other means adapted to steam travel over water-courses, because such travel was unknown at the date when the grants or contracts were made, a stronger argument arises upon grant or contract of present date; for it could not be held, except upon clearest legislative expression, that in the very age of steam a legislature would have made a grant or contract so utterly opposed to public policy and the march of improvement as that to appellant, if interpreted as he desires. This view forces itself, when a glance at the territorial statutes shows, in 1861 railroad grants, with power to build over any stream, when necessary, with similar legislation in 1862, while the same volumes teem with grants, some exclusive in terms, some not; one, at least, in the exact language of Lake's act, for ferries, toll roads and bridges over some if not all of the very streams which railroads had been allowed to cross by cotemporaneous statutes.

Now, shall the legislature be convicted of utter recklessness and chronic stupidity; or shall the more natural inference arise, that it was granting these toll road, bridge and ferry franchises, with the

laudable intent of improving the territory, and giving railroad companies privileges, with the same view?—regarding the one as so entirely distinct from the other, that no confusion could arise.

The legislature in 1861 authorized the Central Pacific railroad “to cross, intersect, join and unite its railroad with any other railroad, either before or after constructed, at any point upon its route.” Was the passage of appellant’s grant a repeal of this privilege, which was further extended two days after such passage? The Central Pacific is connected with respondent; the object of the legislation, continuous and lengthened line of road, is then accomplished. Shall that result be destroyed by appellant’s franchise, or shall it be so hampered that compensation must be made prior to its enjoyment? Certainly, if the legislative intent be so clear as to warrant such course. Such intention must first be attempted to be gathered from the language, which bestows or agrees upon the franchise. Precisely what that franchise is, the language used defines as the right “to charge and collect from persons traveling over and along said road such rates of toll,” &c.

That is the franchise, pure and simple. With that respondent certainly does not interfere, so far as its precise terms go; and the undisputed rule is that nothing is to be inferred in favor of such grants. The language of exclusion found in Section 3, must be construed with regard to the franchise granted, for that is the thing to be protected; and hence, it would only be unlawful to convey persons and property across the river, to the extent that such acts interfered with the collection of tolls from “persons traveling *over and along* said road.” But to take a broader view, and admit that from necessary implication it was intended to give Lake a monopoly of passing for hire, persons and property across the river, at and within a mile on either side of the point specified. Yet every word of the act points to such travel as would come by a road, and by ordinary means of locomotion; and it is in this light that respondent’s doings must be tested.

If it has built a bridge by which the public, moving in any ordinary manner, can cross the river, or established a ferry for like use, or offers any other imaginable means by which such purpose can be accomplished, by ordinary and usual locomotion, then it has

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infringed upon appellant's rights. As has been stated, such is the fact. No foot passenger, no man on horseback, no carriage, large or small, save one adapted to run on rails and over a road bed of the exact gauge of respondent's, can pass the river by the means offered. Even the public traveling in the last mentioned vehicle are excluded, unless they choose to go in one belonging and provided by respondent. The public, as such designation made in the statute, are not served.

In the cases quoted, this is the idea underlying. In the *New Jersey* case much space is devoted to proving that a railroad viaduct is not a bridge, either in ancient or modern sense; but the argument really turns upon the proposition that it is not so, because not what the public can or do use as a bridge, or other means of crossing a stream. Says the chancellor, (2 Beas. 93): "The bridges are declared to be a public highway, free for all citizens to pass over on paying the accustomed toll. But the bridges are free only to those traveling by usual and known methods upon the public highway. They are not free to the great mass of the traveling public. The great torrent of railroad travel must seek another channel. The complainants are neither required nor allowed to accommodate it. Aside from the restrictions which have been imposed upon them by the terms of their contract and legislative enactment, they never could have supposed that they were required to furnish facilities for a railway, or for locomotives and trains of cars, to cross the bridges. It was not within the scope of their contract. If the bridge proprietors were not bound to accommodate the railway traffic, were the legislature restrained by the terms of the grant for providing facilities for railroad travel?"

Appellant's grant requires, as a condition for its use, a deed which is, "to construct, with all reasonable dispatch, a good road with substantial bridges and culverts, over and along said road (from the Junction House in Washoe County to the boundary line between that county and Lake) for the safe and speedy transportation of persons and property, and keep the same in good repair and condition at all times." No fair interpretation of that language can fix upon Lake the burden of providing for the safe and

speedy transportation of persons and property coming in railroad cars drawn by a locomotive, nor the building bridges and culverts, or either, sufficiently substantial to uphold such means of locomotion. Then it cannot properly be claimed, that appellant, though not bound to furnish the means of accommodating the class of travel suggested, yet may prevent others from so doing either absolutely or contingently. That would be to destroy the mutuality of the contract.

To quote once more from the chancellor. "Again, the complainants' franchise consists in the right of taking toll for crossing the river. (A stronger case upon the language of grant than the one at bar.) But the defendants' structure is not a toll bridge. They have no franchise of taking tolls. They have no right to charge for crossing the river, any more than if it were not in existence. The structure which they are erecting is not a mere connection between the opposite shores—it is part of an extended line of railway, connecting distant points, over which the defendants are to transport passengers at a stipulated rate. Nor is it a *free* bridge, by which parties may evade paying toll upon the complainants' bridge, to the prejudice of their franchise. Its character and purpose are in fact essentially different from that of a bridge used merely as a connecting link for the transfer of passengers between the opposite shores of a river." 2 Beas. 94.

So here, the respondent's structure is neither a bridge, a ferry, nor any public means of crossing the river, by any ordinary method of travel; and if any other had been contemplated by the legislature, it should have been, and the legal conclusion is that it would have been, expressed. Nor is it any means of crossing the river save as incidental to the general route of the respondent's railroad. In the same case on appeal, in summing up, Justice Vredenburg says: "I am of the opinion—first, that the proposed structure of the defendants is no bridge of any kind whatever, as the term bridge is used in the charter of 1790; and secondly, that if it were such bridge, the franchises given to the defendants by the act of 1860, are entirely different franchises from those given to the complainants in their charter of 1790; that the railway franchise given by the act of 1860 to the defendants is no more a bridge

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franchise than it would be a steam ferry franchise, a canal franchise, or a telegraph franchise." 2 Beas. 541. It is in fact something of its own kind; not to be likened to anything else, and so peculiar, and so prominently before the public eye at the date of appellant's grant, that not to name it expressly is to ignore it utterly, as forming one of the public means of crossing Truckee river, referred to therein. There was in the case last cited an assumed element of strength on the side of complainants, which does not exist as to appellant here. There it was claimed, that the legislature in granting the railroad franchise had expressly and in terms recognized the franchise of complainants, and required the railroad corporation to pay for it; but the court said, that such recognition was only of the franchise as it existed, not as it was claimed. So here, if the appellant's real franchise has been infringed, equity should stay the respondent, until compensation made; but it is only in case of the infringement of an actual express right, not one claimed or implied, that equity will interpose in this or similar cases. As to this case, from whatever legal stand-point it be studied, the inevitable conclusion reached cannot be better expressed than in the language of Chancellor Green. * * * "The structure of the defendant's is not designed as an evasion of, or fraud upon, the rights of the complainants (appellants). It is not an attempt to carry passengers across the river, either free or for toll, in evasion of the complainants' (appellant's) franchise. The avowed purpose is to construct and complete a continuous line of road from Newark to Hoboken, (Virginia City to Reno) and to transport passengers over the entire route. The diversion of travel from complainant's (appellant's) bridge, and the consequent loss of tolls, is an incidental consequence of opening a new route of travel, of which the complainants have (appellant has) no legal right to complain." 2 Beas. 96.

It follows that the order of the district court was correct and should be affirmed.

It is so ordered.

By GARBER, J.: I dissent.



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**D. W. PERLEY, RESPONDENT, v. CHARLES FORMAN,
APPELLANT.**

WHERE NO EVIDENCE TO SUSTAIN COMPLAINT, INJUNCTION MUST BE DISSOLVED.

Where the main allegations of a complaint for injunction, made upon information and belief, were fully and positively denied by the answer; and on motion to dissolve an injunction granted thereon without notice, the evidence entirely failed to sustain any of the material allegations of the complaint: *Held*, that a denial of such motion was too erroneous to admit of discussion.

DECLARATIONS OF VENDOR AFTER SALE. The declarations of a vendor, made after the sale and not being a part of the transaction, are not admissible in evidence as against the vendee.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The plaintiff alleged that in July, 1871, he employed Thomas Grieves, who was also made a defendant in this action, to proceed from Pioche, in Lincoln County, to Fillmore, in Utah Territory, and purchase from one John McNeill at the latter place two hundred feet of mining ground situate in the Ely Mining District of Lincoln County; that Grieves was to take such purchase in his own name but for the plaintiff's use and benefit; that he furnished Grieves with \$40 to pay his fare and \$100 to buy the mining ground, and gave him a deed made out and ready for signature, and that Grieves procured such deed to be executed and returned therewith. He further alleged on information and belief, that defendant Charles Forman was cognizant of these facts and fraudulently procured Grieves to make a deed of the property, so in his name, to himself; and placed the same on record and held the same for the joint benefit of himself and Grieves; and that such transaction was made in bad faith and in pursuance of a combination to cheat plaintiff. He prayed for an injunction to restrain the transfer of the property by Forman and that the deed to him should be declared null and void.

Upon the complaint, making the above allegations, an injunction as prayed for was issued without notice; and afterwards, the defendant Foreman put in an answer denying all the allegations of the complaint, and those respecting his own connection with the mat-

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ter fully and positively. A motion was then made by the defendant Forman to dissolve the injunction; and on the hearing, an answer fully denying the complaint having in the meanwhile been put in by defendant Grieves, the oral testimony of a number of witnesses was taken. Among others, the plaintiff offered one O'Connell, who testified as to certain declarations made by Grieves after the sale by him to Forman, and to the effect that Forman was informed about the whole matter, and agreed to do whatever Grieves wished. Forman objected to this evidence on the ground that it was hearsay and inadmissible, being a declaration made after the sale, and not a part of the transaction. The objection was overruled and defendant excepted. The motion to dissolve the injunction having been denied, defendant Forman appealed from the order.

Ashley, Thornton & Kelly and C. H. Belknap, for Appellant.

I. As a general rule, where an answer denies all of the equities of a bill, the injunction will be dissolved. *Real Del Monte v. Pored Mining Co.*, 23 Cal. 82; *Gardner v. Perkins*, 9 Cal. 553.

II. The allegations upon which the injunction order was based are made upon information and belief. These allegations are positively denied in the answer, and therefore, in order to continue the injunction, the plaintiff should have shown by affidavits or other testimony at the hearing of the motion to dissolve, the foundation of his information and belief; and also, that his apprehensions of conspiracy were well founded. *Branch Turnpike Co. v. Supervisors Yuba County*, 13 Cal. 190; 12 How. Pr. R. 464; *Forman's Ch. R.* 383; 25 Maine, 23.

III. Upon the pleadings alone the injunction should have been dissolved. Impending waste or irreparable injury is not alleged. No conspiracy to defraud plaintiff is established, nor is fraud any way connected with the transaction on the part of either of the defendants.

Ellis & King, for Respondent.

I. The granting and continuance of the injunction rests in sound discretion of the court below, governed by the circumstances.

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the case, and the court above will not control that discretion less there is a manifest abuse. Hilliard on Injunctions, 81; *Wright v. Somerville*, 3 Halst. Ch. 629; 1 Green. Ch. 172, 452; Stockton Ch. 620; 1 Hemp. C. C. 464; 2 Ired. Ch. 278; 2 Bns. Ch. 202; 3 Sum. 70; 2 Curt. C. C. 506.

II. An injunction will not be dissolved upon the coming in of an answer denying the equities of the bill, if there are any special reasons to authorize the injunction, or any proof to sustain the allegations of the bill. 39 Cal. 166; 4 Edws. Ch. 667; 6 Paige, 1. 295; 2 Jones' Eq. (N. C.) 318; 6 How. Pr. 208; *Lady Bryan v. Lady Bryan*, 4 Nev. 414.

A special reason authorizing the injunction and demanding its continuance is, that it is the only restraint upon defendant Forman making an adverse disposition and conveyance of the property in dispute; and upon a dissolution of it the complainant would be likely lose all the benefits of his suit.

III. The chancellor having his conscience informed by the proofs and statements of both parties, with the witnesses before him, where their manner can be scrutinized, their motives, impulses, sympathies and prejudices noted, the exercise of his discretion will not be controlled by this court, where there is any evidence to sustain his decision. Where fraud is of the gravamen of the bill, the temporary injunction is never dissolved merely upon the coming in of an answer denying the equities of the bill. Hilliard on Inj. 93.

D. W. Perley and Quint & Hardy, also for Respondent.

By the Court, WHITMAN, J. :

To the complaint of respondent, the main allegations of which so far as the appellant is concerned are made upon "information and belief," a full and positive denial is made by answer; thereupon a motion to dissolve the injunction previously granted without notice. The evidence introduced upon the hearing of such motion entirely failed to sustain any of the material allegations against appellant. The only testimony which in the remotest degree tended thereto, that of O'Connell, should have been excluded under the objection made. Still the motion was denied. Under what rule of procedure

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or principle of equity, it is impossible to say. This action was ~~to~~ clearly erroneous to admit of discussion. The order appealed ~~from~~ is reversed, and the injunction granted against appellant is dissolved.

THE OVERMAN SILVER MINING COMPANY, APPELLANT, v. THE AMERICAN MINING COMPANY, RESPONDENT.

CERTIFICATE OF JUDGE TO STATEMENT FOR NEW TRIAL. Where a district judge certified at the end of a statement "that the foregoing is the settled and engrossed statement on motion for new trial of the above entitled cause": *Held*, that though not a literal compliance with the statute, such certificate was a substantial compliance and sufficient.

PRESUMPTIONS IN FAVOR OF JUDGE'S CERTIFICATE. Where a district judge certified that a statement on motion for new trial was "the settled and engrossed statement on such motion": *Held*, that giving proper effect to the legal presumptions in favor of the action of the judge, the certificate implied that a proposed statement was presented; that it was unsatisfactory; that amendments were filed; that on due notice the judge considered and passed upon the same, allowing such as made the statement conform to the truth; and that the document was a fair and correct copy of such statement as amended.

PRACTICE ACT, SECTION 197—MEANING OF "SETTLED" IN JUDGE'S CERTIFICATE. The express requirement of the statute, that a judge's certificate to a settled statement on motion for new trial shall affirm its correctness, (Practice Act, Sec. 197) does not preclude such presumptions as fairly arise from the language actually employed; so that when a judge certifies that he has settled a statement, he in effect certifies that it is a true and correct statement.

BOUNDARIES OF MINING CLAIM—CHARGE APT TO MISLEAD. Where an instruction was given, in a case of dispute between two adjoining mining companies as to their boundary, that "when boundaries have been established defining and denoting the size and limits of the claim upon the surface, and for a long period have been recognized as such, the extent of the claim will be confined to the extent as manifested by such surface boundaries"; and the state of the testimony was such that the instruction applied to, or was apt to be understood by the jury to refer to, a fixing or recognition of boundaries accruing after the consummation of the original location and appropriation, and consisting merely in the declarations of superintendents and other officers not authorized to fix boundaries: *Held*, error.

MINING CLAIMS NOT TO BE REDUCED BY MERE DECLARATIONS OF SUPERINTENDENTS. After a vested right to a mining company's claim has been acquired by a compliance with the laws, it is not held by so precarious a tenure as that it can be reduced by mere declarations of superintendents and officers.

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OF MINING COMPANY'S CLAIM—DECLARATIONS OF PRESIDENT. It seems at in a dispute as to the extent of a mining company's claim, the declarations of the president as to the position of the boundaries, if objected to, are not admissible in evidence.

APPEAL from the District Court of the First Judicial District, Storey County.

The plaintiff in its complaint in this action, which was commenced 4th, 1869, set forth that it was and had been for more than twenty years the owner and possessor and entitled to the possession of a certain mining claim and quartz lode in the Gold Hill Mining District, in Storey County, commencing on the Comstock lode at the southern boundary of the claim of the Segregated American Mining Company and running southerly twelve hundred feet, that it and those under whom it claimed had obtained possession and occupation thereof under the mining rules and customs of the district, and expended in labor and improvements thereon more than one thousand dollars; that defendant claimed to be the owner and entitled to the possession of the southerly four hundred feet of the claim, and had made application at the United States Land Office for a patent therefor; and that plaintiff had filed a protest against the issuance of such patent. It prayed for judgment awarding the ownership and right of possession of the mining ground to itself, rejecting the adverse claim of defendant, and determining the rights of the parties as required under the act of congress of July 26th, 1866. The defendant by its answer denied the allegations of the complaint, set up ownership and right of possession in itself to the southerly four hundred feet of ground in dispute; also set up the statute of limitations, and averred actual possession in itself and its grantors for more than five years, of the southerly three hundred and fifty feet of the ground claimed.

The cause was tried before a jury, and there was a verdict and judgment for defendant and against plaintiff. A motion for new trial made by plaintiff having been overruled, this appeal was taken from the order and from the judgment. "By the statute, where there is a jury trial, nobody but the district judge could legally make a statement."

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The facts necessary for an understanding of the points decided are stated in the opinion.

Mitchell & Stone, for Appellant.

I. Although the language used in the judge's certificate to statement is not *verbatim et literatim* with the language of statute, yet a substantial compliance therewith and with the intention of the legislature is quite apparent. All presumptions are favor of the regularity of the proceedings in the court below, as of the official acts of the district judge. *Champion v. Sessions*, Nev. 271; 4 Nev. 414; 9 Cal. 565. The presumption then is that the statement was settled by the district judge, because the law does not authorize him to make certificate to a statement settled by any other person. To draw any other conclusion would necessarily impeach the integrity and learning of the judge who wrote the certificate, the judicial record of whom is sufficiently established to refute any such inference. A substantial compliance with the statute is all that is required. *Henderson v. Grewell*, 8 Cal. 582; *Van Pelt v. Littler*, 14 Cal. 196; *Cosgrove v. Johnson*, 30 Cal. 511; *Kidd v. Laird*, 15 Cal. 177.

II. Counsel reviewed the testimony, and claimed that the judgment was not supported by it.

III. There was error in permitting the witnesses to testify against plaintiff's objection, to declarations made by the superintendent and others, as to the boundaries of the Overman claim. The declarations of an agent of a corporation are admissible and binding upon the corporation only when made within the scope of his authority. Here the superintendent was not authorized by his declarations to bind the company, because he was not an owner and because he could not, within the scope of his authority as superintendent, bind the corporation by his declaration.

IV. The portion of the judge's charge marked "E" does not enunciate a correct principle of law, and therefore, necessarily, the jury must have been misled. It is true the court had charged that the rights of the parties were confined and limited to such ground and ledge as was originally located, claimed and acquired by the

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cations and appropriations; but it had previously told the jury the only method under *the mining laws* by which a quartz ledge could be appropriated, that is, "persons are required by the mining laws to *establish* the boundaries denoting the claim on the ground, by planting stakes and recordation of a notice of the location," which instruction misstated the law and fact. The jury was bound, under the foregoing instructions, to say: The principle of law declared prohibits us from considering the mining laws, the notice of location, the deeds to defendant, and from considering the testimony to show that the disputed ground lies within the distance claimed in plaintiff's notice of location; and our duty, therefore, is simply to consider where the stakes were placed.

R. S. Mesick, for Respondent.

I. There is no authenticated statement which the court can consider as ground for a reversal of the order denying a new trial. The certificate appended to what purports to be a statement, lacks all the elements requisite to prove the correctness of the statement, and leaves it destitute of all substantial authentication. It does not purport to state who settled or engrossed the statement, or to state that the statement has been allowed by anybody, or to state that the statement is correct, or that it is not wholly false and incorrect. The truth of the certificate is entirely consistent with the entire absence of truth and correctness in the statement. The legal presumption is, that if the statement was settled by the judge and is correct, the certificate would have been made to state those facts, and that their omission from the certificate implies their non-existence. Our statute prior to 1869, like that of California prior to 1861, only required that the statement should be settled by the judge; but the amended law there, as well as here, now requires that when the statement is settled by the judge, "the same shall be accompanied by his certificate that the same has been allowed by him and is correct." A compliance with the terms of the statute must be affirmatively shown by the record. *Linn v. Twist*, 3 Cal. 19; *Van Pelt v. Littler*, 14 Cal. 194; *Kidd v. Laird*, 15 Cal. 61; *Kimball v. Semple*, 31 Cal. 663; *Caples v. Central Pacific R. R. Co.*, 6 Nev. 271; *Howard v. Winters*, 3 Nev. 543; *Sher-*

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wood v. Sissa, 5 Nev. 353 ; *Mc Williams v. Hirschman*, 5 Nev. 263 ; *Caldwell v. Greely*, 5 Nev. 258 ; 32 Cal. 302 ; 25 Cal. 490, 491 ; *Ordway v. Conro*, 4 Wis. 45 ; *Hackett v. Bonnell*, Wis. 471.

II. Counsel next made the point that the verdict was justified by the evidence, and presented a full abstract of the testimony and argued its effect.

III. There was no error in the admission of the evidence as the acts and statements of the officers or agents of the Overman Company. That evidence was elicited and was clearly admissible for the purpose of rebutting the claim of plaintiff, made both in its complaint and in its proofs, that it and its predecessor had been in actual possession of the twelve hundred feet claimed, for more than five years ; and also admissible under the averments of the answer as to want of such possession in them. Technically, the plaintiff was bound to show an actual possession in itself when the suit was brought. *Pralus v. Jefferson Co.*, 34 Cal. 558 ; *Brook v. Calderwood*, 34 Cal. 563.

IV. The portion of the charge marked " E " must be read and considered in connection with the balance of the charge ; and when so read it declares correct doctrine, and could not have misled the jury. The court just previously had limited the jury to the consideration of the original locations and appropriations under which the parties litigant claimed, and it is apparent from every line of the charge that it was devoted exclusively to limiting the jury to these original locations, and to explaining the principles by which their validity and priority were to be determined by the jury in making up their verdict. No one reading the whole charge could fail to understand and apply the language used exclusively to the subject matter of making these original locations. Therefore the meaning of this portion of the charge was, and was by the jury understood to be, that boundaries *established and defined by the locators* and by them long recognized cannot be disregarded. The instruction is consistent with the establishment of the southern boundary of the Overman location, at any point where the jury might believe from the evidence this boundary was originally established by the locators of the Overman claim.

By the Court, GARBER, J. :

The certificate to the statement reads : " I hereby certify that the foregoing is the settled and engrossed statement on motion for new trial of the above entitled cause. Virginia, June 24th, 1871. Richard Rising, District Judge." The respondent contends that this fails to show even a substantial compliance with the statute, which requires that, when a statement is settled by the judge, it shall be accompanied with his certificate that the same has been allowed by him, and is correct.

It is much better and safer to follow the very language of the statute, but the law does not exact such a literal compliance. A substantial compliance entitles the statement to consideration, and such, we think, is here shown. Allowing proper credit to the judge for official knowledge and fidelity, and giving proper effect to the legal presumption that he did his duty, it appears, from this certificate, that a statement was proposed by the plaintiff; that it was not satisfactory to the defendant, and that consequently amendments were filed; that on due notice the judge considered the same, and passed upon the correctness and propriety of the respective claims and assertions of the parties in regard to what actually transpired at the trial, allowing such amendments as made the statement conform to the truth; and that the document in question is a fair and correct copy of such statement as amended. When the judge certifies that he has settled this statement, he in effect certifies that it is a true and correct statement. The fair and reasonable presumption is, that, in settling it, he made it conform to the truth. Construing the whole statute together, with reference to its general scope and object, it is evident that it was contemplated that where no amendments are filed, the truth of the statement proposed on motion for new trial is to be assumed. In case of dispute as to its correctness, the judge is to decide, and his decision when made is *prima facie* correct. The express requirement that the certificate shall affirm the correctness of the statement, does not preclude us from recognizing such presumptions as fairly arise from the language actually employed. This has been frequently held in the analogous case of a certificate of the acknowledgment of a deed. For instance,

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the word "known" has been considered the equivalent of the word "personally known," on the ground that personal knowledge is implied, unless negatived by a further statement that such knowledge comes from information. The omission of the words "undue influence" has been held not to vitiate a certificate containing the other words required, and which, in themselves, negatived the existence of undue influence. So, where the statute required the certificate to state the acknowledgment of the party that he executed the deed freely and voluntarily, a certificate of his acknowledgment that he executed it was held sufficient, on the ground that the voluntary execution of the deed must be presumed from the fact that it was acknowledged that he executed the same. 22 Iowa, 147; 9 Mich. 522; 8 Cal. 87, 584; 13 Ib. 83; 26 Miss. 574; 4 Halsted, 223 Dana, 114.

The only assignment of error which it is necessary to consider is based upon the following exception: "The plaintiff excepts to the portion of the charge which reads: 'E. When boundaries have been established, defining and denoting the size and limits of the claim upon the surface, and for a long period of time have been recognized as such, the extent of the claim will be confined to the extent as manifested by such surface boundaries.' " The grounds stated were, that the instruction disregards the size and limits of the claim as located and recorded, and that the period of time mentioned is indefinite, and that it is not stated by whom such boundaries should have been recognized, and that the same was calculated to mislead the jury. The respondent contends "that this portion of the charge must be read and considered in connection with the balance of it; and, that when so read, it declares the correct doctrine and could not have misled the jury." We consider it, then, in connection with the matter pertinent thereto disclosed in other portions of the record. The jury were instructed as follows: "The subject of controversy in this action is 400 feet of the quartz ledge described in the complaint. The matter of title and possession of this ground is the material issue submitted to your consideration. Persons designing to appropriate a mining claim are required by the mining laws to establish boundaries, denoting the claim on the ground by planting stakes

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and the recordation of a notice of location, so that the public may be apprised of the particular claim made and its extent. Each of the parties to this suit claims the disputed ground by virtue of locations of the quartz ledge made by their predecessors. The rights of these parties are confined and limited to such ground and ledge as was *originally* located, claimed and acquired by the locations and appropriations. You must ascertain and determine from the evidence what quartz ledge or ledges were originally located and claimed, and their rights will be in accordance. The acts, declarations and works of the locators of the respective claims and all circumstances attending the locations can be taken into consideration by you, in passing upon this question. If you should believe that the Overman claim was located for the ledge in controversy, as also that of the North American claim, and the locations conflict upon the ground, the superior and paramount location and possessory right will prevail, to the extent of the prior right in the party, as it existed at the time of the commencement of this suit." Afterward, in the charge, occurs the portion "E" above set forth.

The plaintiff and the defendant claim respectively portions of the Comstock lode. The northern boundary of the defendant's claim is the southern boundary of the plaintiff's claim. The dispute is as to the locality of the dividing line. The plaintiff introduced evidence tending to prove that, prior to the location of the defendant's claim, the predecessors of the plaintiff located the Overman; that they planted a southern stake far enough south to include the ground in controversy, and recorded a notice the description in which also included the disputed ground. The defendant introduced testimony tending to show that said south stake of the Overman was not originally planted far enough south to embrace the disputed ground; and other testimony tending to show (or which a jury, thus instructed, may have believed themselves entitled to consider as evidence) that, even if it were originally so planted, what the defendant claims as the southern boundary of the Overman had been subsequently and prior to the commencement of this action, fixed and recognized as the true boundary line.

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This testimony consisted, in part, of declarations made by successive superintendents and officers of the plaintiff. For example McCullough testified that in 1869, just before he ceased to be superintendent, he supposed the south line had been fixed at a point excluding the disputed ground. The witness Hunt was asked by the defendant this question: "Did Mr. Arrington, the president of the Overman, at any time while such president, point out to you where the south stake of the Overman had been." The plaintiff objected to the question, on the ground that Arrington as president could not fix a boundary binding upon or affecting the Overman Company; that his declarations as to boundaries were unauthorized and incompetent to establish the boundaries or affect the title of the corporation. The objection was overruled, and the witness answered that Arrington pointed out the place as being at the locality for which the defendant contended. Similar objections were overruled to questions which elicited testimony showing that, long after the original location of the Overman, superintendents of the plaintiff pointed out the south boundary of its claim as being, at the times of the pointing out, where the defendant would have it. If the portion of the charge marked "E" applies to, or was apt to be understood by the jury to refer to any fixing or recognition of boundaries, occurring after the consummation of the original location and appropriation of the Overman, it was clearly so erroneous as to justify a reversal. No one would contend that, after a vested right to a mining claim has been acquired by a compliance with the laws, it is held by so precarious a tenure as that indicated, or that a corporation succeeding to such a right of property holds it as tenant at the will of its own superintendent and officers. But, in the light of the foregoing extracts from the record, the respondent contends that "the jury must have understood the court as referring to the original locators and *their* acts of defining boundaries, and consequently were not misled by this portion of the charge." In other words, the contention is, that this was merely a repetition of former portions of the charge. We think the inference is the other way. The plaintiff contended that it was entitled to all the ground called for by the recorded notice, irrespective of the position of the original stakes, and without regard to the question

whether any stakes were ever planted, defining the boundaries on the surface. The first portion of the charge explicitly denied this proposition, and informed the jury that the plaintiff was entitled to no more ground than was originally located and segregated by the concurrent acts of planting stakes and recording a notice. If the instruction had stopped here, the jury would have been at liberty to give to the plaintiff all the ground which, "by considering the acts, declarations and works of the *locators* of the respective claims, and all the circumstances *attending the locations*," they should ascertain to have been embraced within the original location. But the court goes further, and next tells them, in effect, that the right of the plaintiff is also limited by its extent, as it existed at the time of suit brought. That is, that the right is not to be in accordance with the original location, but in accordance with the original location as modified by subsequent fixing and recognition of boundaries. For it was not pretended, nor was evidence introduced to show, that in any other way the extent of the claim had been reduced below its original dimensions. And they are finally told, in unqualified language, that the extent of the claim must be confined within the boundaries as established and recognized no matter when, for how long, or by whom; and this, after testimony almost if not quite as vague and indefinite as the terms of the instruction, and which might be construed as tending to show such a fixing and recognition of boundaries long subsequent to the original location had been admitted; and against a specific objection, then and there made, that the instruction was liable to be misunderstood by the jury, as disregarding the size of the claim as located and recorded, and as giving effect to a temporary and casual recognition of such boundaries by unauthorized persons. We cannot say, on this record, that the jury may not have understood this instruction to mean that although, by the original location, the plaintiff's predecessors acquired a right to the disputed ground, yet that if different boundaries (whenever or by whomsoever fixed or established) including less ground had been long recognized by successive officers of the plaintiff, such recognized boundaries must control; and, for aught we know, they may have decided the case on this theory—thus giving effect to the whole charge, as imposing two distinct

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limitations, neither of which could be disregarded in determining the extent of the claim; while, according to the respondent's construction of the charge, no effect whatever is given to the element of long recognition introduced by the portion under consideration. The question of the admissibility of the declarations of Arrington and others is of great practical importance, and has not been fully argued. The authorities seem to be against the admissibility of those of Arrington. *Vide* 13 Conn. 173; 48 Penn. 177; 11 Gray, 504; 9 Rich. (Law) 473. But we do not decide the point. For the error in overruling the objections made to instruction "E," the order appealed from is reversed, and the cause remanded for a new trial.

By WHITMAN, J., dissenting:

I think the objection to the statement is good, and should be sustained. For some reason, the legislature has provided not only that the judge shall certify that he has allowed a statement settled by him, but that he shall also state that it is correct. "When settled by the judge or referee, it shall be accompanied with his certificate that the same has been allowed by him, and is correct." Stats. 1869, 227. An exact compliance with the statute is easy, and certainly best; for although a substantial compliance would undoubtedly be sufficient, the difficulty occurs then that the peculiarities of judicial ratiocination decide what the statute, if exactly followed, definitely determines. As in the present case, the majority of the court deem the certificate attached to the statement a substantial compliance with the statute; while to me it bears no element of, or semblance to, such compliance. It does not state by whom it was settled, nor that it was ever allowed by the judge, nor that, as settled, it is correct, unless all and each of the elements constituting a statutory certificate are to be presumed. Everything which can be presumed in presence of this certificate can with equal propriety be inferred in the absence of any. It might possibly be a good rule to hold, that when any paper or collection of papers appear in a transcript, it shall be presumed that it or they were used on the hearing below, until the contrary appears affirmatively, by the affidavit of the objecting party; but such course

would certainly be to make law rather than to follow it, and would most probably result in harm rather than good.

It must be held, it seems to me, that the statute, in its minuteness, was intended to do away with presumptions in favor of the district court, which might otherwise have been properly indulged; and especially with that which would probably legally arise, that a statement is necessarily settled correctly when allowed by a judge; because it directs not only a certificate of allowance, but also of correctness. The Supreme Court of California held, under a like statute, that a certificate by a district judge that a statement was correct according to his recollection, was no substantial compliance with the statute. *Van Pelt v. Littler*, 14 Cal. 194. See also *Cosgrove v. Johnson*, 30 Cal. 509. This is a much stronger certificate than the one at bar. It might with some force be said, that the words "according to his recollection" should be held superfluous, as a judge must always act according to his recollection in such matter, unless opposed by the record; but the decision is evidently based upon the idea that the words used weaken the assertion of correctness, and that the statute is to be strictly pursued. Such (as I read) is the spirit of all the decisions in California and in this state; and though hardship may thereby occur in specific cases, yet exactitude of practice is the only sure road to substantial justice. To consider the certificate here sufficient, is, I think, first to infer the fact of a settlement of the statement by the district judge; then upon the fact so inferred to raise the second inference, that upon such settlement followed his allowance; whence the final presumption of correctness. This, to my mind, is to utterly ignore the statutory requirements.

If, then, there is no authenticated statement, there remains nothing for the review of this court but the judgment roll, upon which no error is suggested. I therefore think the judgment should be affirmed; so thinking, I dissent from the judgment and opinion of the court.

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JOHN JAMES, RESPONDENT, v. ANDREW GOODENOUGH
et. als., APPELLANTS.

IMMATERIAL VARIANCE BETWEEN PROOFS AND ALLEGATIONS. Where in an action for diverting the water of a certain creek, plaintiff alleged in his complaint that in June, 1865, and before the alleged diversion, he and one Epstein recorded a claim to all the waters of the creek, and within a reasonable time afterwards constructed a flume leading the waters to his land, and that he had acquired all the interest of Epstein; and on the trial plaintiff testified that he and one Jones constructed the flume in 1864, and in 1865 he and Epstein recorded the claim; and a motion by defendant to strike out the testimony on the ground that it did not conform to the allegations of the complaint was denied: *Held*, that there was no fatal variance and that the ruling was not error.

CORRESPONDENCE OF "ALLEGATA" AND "PROBATA" ONLY REQUIRED IN ESSENTIAL PARTICULARS. If the proofs in a case correspond with the allegations of the pleadings in respect to those facts and circumstances which are, in point of law, essential to the cause of action, it is sufficient.

IMMATERIAL ALLEGATIONS NEED NOT BE PROVED AS LAID. Immaterial allegations, such as probative facts not descriptive of some essential averment, need not be proved as laid.

IMMATERIAL AVERMENTS AS TO TIME OF ACTS DONE. Where, in a complaint for the diversion of the waters of a creek, it was alleged that plaintiff first recorded a claim to the water and afterwards constructed a flume for leading it to his land: *Held*, that, supposing the allegations to be material, it was immaterial which was prior in point of time, and that therefore a variance in the proof from the priority as alleged was equally immaterial.

NO CONSIDERATION OF INSUFFICIENCY OF EVIDENCE ON APPEAL WHERE NO MOTION FOR NEW TRIAL. Where there is no motion for new trial, the Supreme Court will not consider an objection that the findings are not justified by the evidence.

APPEAL from the District Court of the Second Judicial District,
Douglas County.

This was an action against Andrew Goodenough, Samuel Bel and Edward Cassity, for diversion of the waters of Hartshorn Creek, in Douglas County, asking damages in the sum of five hundred dollars, and for an injunction to restrain further diversion. The court below found that the plaintiff and his grantors appropriated the waters of the creek in 1853, for irrigating purposes; that in June, 1865, he and Henry Epstein recorded a claim for seventy

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inches of the waters of the creek, and appropriated such seventy inches of water by constructing a flume for conducting the same to his land; that the plaintiff was the owner and entitled to such water, and that the defendants had wrongfully diverted the same, and threatened to continue such diversion. There was a judgment in favor of plaintiff for one dollar damages, and for costs, and for a perpetual injunction restraining defendants from diverting or using any of the waters of the creek, except such as might be in excess of the seventy inches belonging to plaintiff. From this judgment the defendants appealed. There was no motion for a new trial.

T. W. W. Davies, for Appellants.

I. The allegation of the construction of the flume subsequent to June, 1865, and the diversion and use of seventy inches of water through the same, are facts *essential* to the support of the action. It is a rule that the allegations and proofs must correspond; and the consequence of this rule is another, that evidence of a fact *essential* to the support of an action cannot be heard unless it be *averred* in the complaint. *Maynard v. F. F. Insurance Co.*, 34 Cal. 60; *Green v. Palmer*, 15 Cal. 415; *Graydon v. Gaddis*, 20 Ind. 518.

II. The objection to the variance between the complaint and the proofs was made in a stage of the trial when the court could have allowed an amendment; and therefore no objection can be urged that it was not in time. See *Ward v. Forrest*, 20 How. Pr. 465; *White v. Stillman*, 25 N. Y. 452.

III. Injury is presumed from evidence erroneously admitted, and the adverse party must show clearly that no injury accrued, or the judgment cannot stand. It is submitted that the court erred in admitting the testimony objected to, and that injury is presumed to have resulted to defendants thereby. *Soule v. Dawes*, 6 Cal. 473; *Mc Cloud v. O'Neal*, 16 Cal. 32; 1 Cal. 462; 25 Cal. 471; 27 Cal. 568; 26 Cal. 130; 30 Cal. 394; 14 Cal. 18; 28 Cal. 539.

IV. In the cases holding that findings will not be reviewed on appeal, unless there is a motion for new trial, we have looked in vain for any sufficient reason to support the rule; and we speak of

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it as a rule, because, in our opinion, there is not only no law justifying the position, but its assumption is in derogation of the rights of the appellant, as provided in Section 332 of the Practice Act. The remedy by motion for new trial is in *no case* exclusive; and to hold that a new trial must be asked for, when the error assigned is that the court has made its findings and entered judgment unsupported by the evidence, is saying, as clearly as can be said in any other case, that the trial court must have an opportunity of committing the same error twice before an appeal will lie. See *Rice v. Cunningham*, 29 Cal. 495; *Crook v. Forsyth*, 30 Cal. 662; 32 Cal. 102; 33 Cal. 202, 356, 522, 650.

D. W. Virgin, for Respondent.

I. The variance, if any, was immaterial, and there is nothing to warrant the assumption that the testimony admitted was ever considered by the court in making its findings. Plaintiff might have built his flume in 1863, but testimony to that end could avail him nothing, neither could it prejudice the defendants, as the plaintiff did not claim any right, privilege, or benefit by reason of any flume constructed prior to 1865.

II. The assignment of error, that the findings are not justified by the evidence, will not be considered by this court on appeal, as the statement does not purport to contain all the evidence, and because defendants made no motion for new trial in the court below. See *Harper v. Minor*, 27 Cal. 107; *Moore v. Tice*, 22 Cal. 513.

Robert M. Clarke, also for Respondent.

By the Court, GARBNER, J. :

The plaintiff obtained a decree enjoining the defendants from diverting the water of a certain creek. The complaint alleges, among other things, that, in June, 1865, the plaintiff and one Epstein recorded a claim to all the water of said stream, and, within a reasonable time thereafter, constructed a flume leading from the channel of the creek to the land of the plaintiff before described, into which they turned and through which they conducted said water over and upon said land, for the purpose of irrigating the same; and that the

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plaintiff had acquired all the interest of Epstein. On the trial the plaintiff testified that he and one Jones constructed the said flume in 1864, and that, in 1865, Epstein and the plaintiff recorded the said claim. The defendants moved to strike out the testimony as to the construction of a flume in 1864, by the plaintiff and Jones, on the ground that it did not conform to the allegations in the complaint. The motion was overruled, and the ruling excepted to. The appellants contend that this was a fatal variance; but we are nearly of opinion that it was not.

It is sufficient if the proofs correspond with the allegations in respect of those facts and circumstances which are, in point of law, essential to the cause of action. The *allegata* and *probata* need have only a legal identity, and this consists in their agreement in all the particulars legally essential to support the claim preferred. Immaterial allegations, such as probative facts not descriptive of some essential averment, need not be proved as laid. 3 Starkie v. 1525 *et seq.*; *Patterson v. Keystone Mining Co.*, 30 Cal. 364. Here the essential *facts*—those constituting the cause of action—

1. That before and at the time of the diversion mentioned the plaintiff was seized in fee and possessed of the land described, situated upon the creek mentioned.
2. That during all that time the plaintiff had the right to use and enjoy, and ought to have had and enjoyed, and still, of right, ought to have and enjoy the benefit and advantage of the water of said water-course, which during that time ought to have run and flowed, and until the diversion, etc., of right had run and flowed, and still of right ought to run and flow therefrom through a certain flume leading from the channel of said creek to said land and parts thereof beyond and remote from said creek, and from thence on, into and over said land for the irrigating and watering thereof, and the benefit and improvement of the soil thereof.
3. The continuing diversion by the defendants, the damage, etc. See 2 Chitty Pl. 786–794 (a); *Ib.* 799, 800, note (y); *Twiss v. Baldwin*, 9 Conn. 191; 13 Cal. 221; 1 McCarter, (N. J.) 2; 35 Penn. 88. At least, none of the other allegations of the complaint can be claimed to be essential or constitutive.

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The case thus made is equally supported, whether the evidence be that the flume was constructed in the year 1864 by Jones and the plaintiff, or in the year 1865 by Epstein and the plaintiff. Proof that the water was turned into the flume in 1864 certainly not so inconsistent with the allegation that the water did flow and ought to have flowed through it in 1865, as to disprove it altogether. Such a redundancy of proof is wholly unimportant. 3 Starkie, 1558.

The variance from the formal allegation as to the time when and the person by whom the flume was constructed would not be fatal, even on the supposition that the recording of the claim to the water and the construction of the flume were each of them material facts. Their priority in point of time being absolutely immaterial, a variance from the priority as alleged is equally so. The agency by which the act was performed is a circumstance as unimportant as its date, and as little descriptive of the material fact. Ibid, 1553-1569.

It is urged that the evidence is insufficient to justify the findings. But no motion for a new trial was made, and in no other manner can the question be raised. The judgment is affirmed.

THE STATE OF NEVADA, RESPONDENT, v. EDWARD RODERIGAS, APPELLANT.

CRIMINAL LAW — OBJECTION THAT INDICTMENT WAS NOT FOUND BY PROPER GRAND JURY. An objection to an indictment that it does not show that it was found by a grand jury having the proper authority, must be raised on motion to set it aside under Section 275 of the criminal practice act, or taken by special demurrer under Sections 286 and 287; and if not so raised or taken, it is waived by operation of Sections 277 and 294.

SPECIAL POINT NOT TO BE RAISED UNDER GENERAL DEMURRER TO INDICTMENT. The point that an indictment fails to show that it was found by a proper grand jury, cannot be raised under a general demurrer that the facts charged do not constitute a public offense.

INDICTMENT FOR ASSAULT WITH INTENT TO MURDER — CHARGING THE INTENT. Where an indictment for an assault with intent to commit murder, under Section 47 of the criminal code, charged that defendant made an assault upon and shot Benjamin Elsworth with a gun "with intent him, the said Benjamin Elsworth, then and there feloniously, willfully and with malice afore-

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ought to murder"; and it was objected that the facts were not set out showing an intent to murder: *Held*, that though "murder" might be a conclusion of law, the charging the intent to commit murder in the language of the statute was sufficient and proper.

BY OR INJURY NOT NECESSARY TO CONSTITUTE "ASSAULT WITH INTENT TO COMMIT MURDER." In an indictment for "an assault with intent to commit murder" under section 47 of the criminal code, it is not necessary to allege battery or injury of any kind.

SUFFICIENT SHOWING IN BILL OF EXCEPTIONS — IRREGULAR IMPANELMENT OF JURY. Where an objection was made in a criminal case to the panel of trial jurors, but the bill of exceptions, which was supposed to raise the point, failed to show the facts, and the judge below in certifying it expressly stated that the facts upon which the point was based were not as assumed by counsel: *Held*, that there was no showing of irregularity, and that the point raised could not be considered.

RECORDING OF IRREGULARITY IN DRAWING TRIAL JURY MUST BE DISTINCTLY SET FORTH. If it be desired in a criminal case to take advantage on appeal of an objection that the trial jury was irregularly drawn and impaneled, the facts showing the irregularity should be distinctly stated in the record; and in the first place it should be shown how the jury was in fact selected.

REPLETORY CHALLENGE MAY BE REQUIRED IMMEDIATELY AFTER CHALLENGE FOR CAUSE. Where a defendant in a criminal cause was required to accept or repletorily challenge each juror immediately after it was found that there was no ground of challenge for cause: *Held*, no error.

REMARK OF JUDGE TO JURY IN CRIMINAL CASE TO "AGREE QUICKLY." Where the judge in a criminal case made a remark to the jury that it was his earnest desire that they should agree quickly: *Held*, that though such remarks had better always be omitted, there was no intimation that the jury need not give the case the most deliberate and careful consideration, and that, as it could not be seen that the remark could result prejudicially to defendant, there was no error.

SUFFICIENT TO CONSTITUTE "ASSAULT WITH INTENT TO COMMIT MURDER." Where on a trial of Roderigas for assault with intent to murder Elsworth, it appeared that Elsworth and one Matias had gone to the house of Roderigas for the purpose of getting certain boards fastened to such house; that Roderigas had previously given them permission to come and take the boards; that while Matias was engaged in taking the boards from the house, Roderigas, with intent to shoot one or the other, shot Elsworth, who stood some distance off; and it did not appear that the permission to take the boards had been withdrawn: *Held*, that the facts were clearly sufficient to justify a conviction of the crime charged.

APPEAL from the District Court of the Second Judicial District, Elko County.

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On account of the objections raised to the indictment case, it is deemed advisable to present it in full. It was as follows:

- In District Court, Second Judicial District, Douglas County, State of Nevada, December Term, A. D. 1871.

The State of Nevada	}	Indictment.
against		
Edward Roderigas.		

Defendant, Edward Roderigas, above named, is accused by a grand jury of the county of Douglas of the crime of assault with an intent to commit murder, a felony, committed as follows: that said Edward Roderigas, of the county of Douglas, State of Nevada, on the twenty-fifth day of July, A. D. 1871, thereabouts, at Pine Nut, in the county of Douglas, State of Nevada, without authority of law, feloniously, willfully and with aforethought, with a gun in the hands of him, the said Edward Roderigas, then and there had and held, did assault and beat Benjamin Elsworth, with the intent him, the said Benjamin Elsworth, then and there feloniously, willfully and with malice aforethought, to murder. All of which is contrary to the statutes in such cases made and provided, and against the peace and good government of the State of Nevada.

MOSES TEBBS,

District Attorney, Douglas County, State of Nevada.

Names of witnesses examined and sworn before the grand jury: J. A. Smith, F. McElvaine, Martiso Arballo."

Endorsed as follows:

"In District Court, Second Judicial District, Douglas County, Nevada.

"The State of Nevada against Edward Roderigas—Indictment for an assault with an intent to commit murder.

"A True Bill: A. B. Boles, foreman of the grand jury, defendant admitted to bail in the sum of \$5,000, gold coin. Harris, Judge.

"Presented in open court by the foreman of the grand jury.

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presence thereof, and filed this fourth December, A. D. 1871. L. Furth, Clerk."

he "Bill of Exceptions" referred to in the opinion was, after giving the title of court and cause, as follows: "Defendant objects to the second panel of trial jurors, for that they were not sworn, selected or summoned or returned as required by the statute, in that two hundred names were not drawn or selected from the assessment roll of the county; that the names selected from the assessment roll were so selected and drawn, not by the county assessor and judge, but by the county clerk and judge; that the defendant was compelled by the court to commence the selection of a jury from a venire issued December 4th, 1871, and returned December 7th, 1871, when there was another venire issued on the twelfth of November, 1871, and returned served December 7th, 1871, which had not then been exhausted in whole or part, and the said second venire, from which said second panel had been sworn and selected, was taken from the jury box containing said names so drawn from the assessment roll as aforesaid. The court overruled the objection, and the defendant then and there duly accepted."

The foregoing is allowed in the sense that the defendant's counsel stated the above as his grounds of objection; but the correctness of the several grounds of objection in point of fact is not considered. C. N. Harris, District Judge."

The charge of the court to the jury closed with the following words: "Your entire number must agree upon your verdict, and it is the earnest wish of the court that you will speedily agree. The case is now with you."

1. *W. Virgin*, for Appellant.

It does not appear from the indictment that it was found by a grand jury having authority to find it. It does not state that it was found by the grand jury of the county wherein the offense is alleged to have been committed, nor that the grand jury who found the bill was empowered to act at that term of court.

2. The indictment does not charge the crime of which defendant was convicted, nor any offense known to our laws; that is to

say, it does not charge the facts necessary to constitute such crime or any other. *Murder* is a conclusion of law to be drawn from certain facts which constitute its essential ingredients, and the indictment does not state any facts leading to such a conclusion. It is not stated that Benjamin Elsworth was wounded, bruised, hurt, even touched by the gun mentioned, or anything passing from the gun, nor that the gun was even loaded or discharged, nor is it alleged that defendant attempted to kill, or intended to kill Elsworth or any other person. See Stats. 1867, 126.

III. The objection to the panel of the trial jury was well taken, because, if the officers can select a less number than two hundred names, they may as well select twenty-four names to put in the venire in the first instance from the assessment roll. The jury was drawn ten days before the term of court commenced, by the district judge and county clerk. No certificate of the drawing and selection was made or filed, nor was it shown in any manner that the assessor was absent, or that the assessment roll did not contain two hundred names. Stats. 1866, 191.

IV. Defendant had the right to examine and pass for cause twelve jurors, (and also have the state pass for cause the same twelve jurors) before being compelled to exercise his right to peremptory challenge; otherwise, he might be very seriously prejudiced in his right to a fair and impartial trial by a jury of unbiased and impartial men. See *People v. Jenks*, 24 Cal. 11.

V. The judge had no right to instruct the jury that they *must* agree upon a verdict; for, without this instruction, the jury might have failed to agree upon any verdict. Under this instruction an inexperienced juror might have thought it absolutely necessary for him to agree upon some verdict, even if he did so against his honest convictions of right under the testimony. See *People v. Byrnes*, 30 Cal. 206; *People v. Sanchez*, 24 Cal. 17.

VI. Upon the whole evidence the defendant should have been found not guilty. The law giving man the right to use all necessary force in the defense of his person and property, but more especially his dwelling-house, is too old and well understood to require either citation or comment.

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L. A. Buckner, Attorney-General, for Respondent.

By the Court, LEWIS, C. J.:

The defendant was indicted under Section 47 of the criminal code for "an assault with intent to commit murder," convicted and sentenced to the State prison for the term of seven years. Motion for new trial was regularly made and denied, and an appeal is now taken, several assignments of error being relied on for a reversal of the verdict and judgment.

First, it is argued that the indictment is defective, in that it does not show that it was found by a grand jury having the proper authority. To this point it is sufficient to answer that it was not taken by demurrer or by motion at the proper time, and therefore under our statute cannot afterwards be raised. Section 275 of the criminal code of procedure, among other things, declares that "The indictment shall be set aside by the court in which the defendant is arraigned and upon his motion, in either of the following cases: First, where it is not found indorsed and presented as prescribed by this act"; and Section 277 provides that "If the motion to set aside the indictment be not made, the defendant shall be precluded from afterwards taking the objection mentioned." No motion for this purpose was made in this case. Again, Section 286 declares that "The defendant may demur to the indictment when it shall appear upon the face thereof—first, that the grand jury by which it was found had no legal authority to inquire into the offense charged, by reason of its not being within the local jurisdiction of the court." Section 287 makes it incumbent on the defendant to distinctly state the grounds of objection to the indictment, else they shall be disregarded; and Section 294 declares that "Where the objections mentioned in Section 286 appear upon the face of the indictment, they can only be taken advantage of by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment or that the facts stated do not constitute a public offense, may be taken at the trial under the plea of not guilty, and in arrest of judgment." Thus, it will be observed the objection to the indictment that it does not show that it was found by a grand jury having authority to find it, and all objections of as imilar character,

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can only be raised by motion or a demurrer specifically designating the objection. In this case no such demurrer was interposed. The demurrer filed was general, making only the point that the facts charged did not constitute a public offense. So all questions as to the failure of the indictment to show the authority of the grand jury were waived, and cannot now be raised.

Does the indictment charge facts sufficient to constitute the crime of which defendant was convicted? Clearly so. The statute defines the offense as "an assault with intent to commit murder." The very language of the law is employed in defining the crime, and the particular facts showing the manner in which it was committed are quite fully set out. It is alleged, among other things, that the defendant made an assault upon and shot Benjamin Elsworth with a gun, with the intent him, the said Benjamin Elsworth, then and there feloniously, willfully and with malice aforethought, to murder. That murder is a conclusion of law can make no difference here; for an assault with the intent to commit that crime, whether it be a conclusion of law or not, is made a crime by the statute, and the allegation is therefore sufficient. An allegation that an assault was made with intent to commit any other act or offense, would certainly not make the indictment sufficient under this particular clause of the statute; that is, it would not be an assault with intent to commit murder, which is the statutory offense. Nor was it necessary to allege that the person assaulted was in any wise injured. An assault is alleged, and that is sufficient, without an allegation showing a battery or injury of any kind. See *State v. O'Flaherty*, ante, 153.

The objection to the panel of trial jurors is not sustained by any facts in the record. There is no showing that the irregularity complained of really occurred. The statement in the bill of exceptions is not a showing of the facts upon which the objection or exception was based. If it were thought desirable to make the point that the jury was irregularly drawn and impaneled, the facts showing the irregularity should be distinctly stated; whereas, the judge, in signing the bill of exceptions, which is supposed to raise this point, expressly states that the facts upon which the legal points were based were not correct, or rather were not as assumed by counsel. Hence

There is no showing whatever in the record that there was any irregularity in the selection of the jury. Before it can be determined whether there be any irregularity or not in that respect, it is first necessary to show how the jury was in fact selected. This not being done in this case, the legal point discussed cannot be considered. The third assignment of error is that the court erred in compelling the defendant to accept or challenge peremptorily each juror, as it was found there was no ground to challenge him for cause, defendant claiming that the law does not require him to exercise a peremptory challenge until the panel is full. This exact point was decided against the defendant in the case of *The State v. Anderson*, 4 Nev. 265, and we are not now disposed to question the correctness of the views there expressed.

We see no error in the remark of the judge to the jury that it was his earnest desire that they agree quickly. It is difficult to show how such instruction or remark could possibly prejudice the defendant's case. Although such remarks had better always be avoided, there is no intimation that they need not give the case the most deliberate and careful consideration; they might do that and still agree upon a verdict quickly. The only conclusion that the jury could draw from it was that the judge desired them to make no time, but to come to a conclusion as speedily as a due and deliberate consideration of the matter submitted to them would permit of. The case being fully and fairly submitted in other respects, we cannot see that such a remark was error, or that it would result prejudicially to the defendant.

The last ground taken for a reversal of the judgment is, that there was no evidence whatever to warrant the verdict. The testimony detailed in the record does not justify this conclusion of the panel. It is shown that Elsworth and Matias went to the house of the defendant for the purpose of getting some boards or lumber which Matias had left there, some of which had been nailed or fastened to the cabin of the defendant. The defendant had previously informed them that they might come there and take all the boards belonging to Matias, including those attached to his cabin. Matias, it appears, was engaged in taking some of his lumber off the cabin, when the defendant shot Elsworth, who stood some dis-

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tance from the cabin. Now, if it be true that the defendant gave Elsworth and Matias permission to come upon his place and take the boards, which the latter was engaged in taking from the cabin when the shooting took place, and there was no retraction of the permission, and he intended to shoot one of them, surely the defendant was clearly guilty of an assault with intent to murder. It is proven that such permission was given, it is not shown that it was retracted; and the jury have found that the shooting was done under such circumstances as to warrant the conclusion that the defendant intended to shoot some one of the party. Under such state of facts, we as an appellate court cannot say that the evidence did not establish the crime.

Judgment affirmed.

JOHN CONLEY, APPELLANT, v. GEORGE W. CHEDIC,
RESPONDENT.

WEIGHT OF EVIDENCE NOT OPEN TO DISCUSSION WHERE NO MOTION FOR NEW TRIAL. The point that, where there has been no motion for new trial, the Supreme Court will not consider an objection that the evidence does not sustain the verdict and special findings, has been so frequently decided that it is no longer open for discussion.

DEFAULT TO BE AVAILABLE MUST BE SHOWN BY RECORD—PRESUMPTION. Where an objection was made on appeal that the court below erred in denying plaintiff's motion to enter defendant's default and for judgment thereon; and there was nothing in the record to show that a default existed: *Held*, that a default could not be presumed against the action of the court, and that the want of showing in the record was a sufficient answer of itself to the objection.

ALLOWANCE OF ANSWER AFTER TIME GENERALLY MATTER OF DISCRETION. The allowance of the filing of an answer after the time prescribed by statute is a matter very much in the discretion of the district court, and especially where there has been no default entered, and there is no showing that a failure to plead has occasioned any delay or injury to the opposite party.

GENERAL INTEREST OF PEOPLE OF COUNTY IN QUESTION INVOLVED NO GROUNDS FOR CHANGE OF VENUE. It is no ground for a change of venue that the parties to the county, in which the action is to be tried, are generally interested in the question involved.

ONLY PREJUDICIAL ERROR GROUND OF COMPLAINT. Though irrelevant facts admitted by the pleadings are submitted to the jury, yet if a party is not prejudiced thereby, he has no substantial ground of complaint.

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IN TRANSITU THROUGH A COUNTY NOT PROPERLY IN IT FOR TAXATION IS. Where wood cut in California and belonging to a citizen of that state was thrown into the Carson river and simply passed through Douglas County to find a market in Ormsby County, for which it was destined: *Held*, so passing through Douglas County it was not properly in it for the purpose of taxation.

LEGAL "PROPERTY IN COUNTY" IS PROPERLY ASSESSABLE THEREIN. To make goods properly in a particular county, so as to make it legally taxable therein within the meaning of the revenue laws, it must be in such a position as to make it a part of the wealth of that county; it must be incorporated with the other property of the county.

Appeal from the District Court of the Second Judicial District, Ormsby County.

Property of the plaintiff consisted of 1,750 cords of wood 100 feet of timber, and is the same referred to in *Conley*, 6 Nev. 222. It was cut in Alpine County, California, thrown into the Carson river and "driven" down through Douglas County into Ormsby County. While passing through Douglas County it was there assessed for the year 1870, at the value of \$5,900, and the tax, \$169.63 paid. After it came to Ormsby County, the defendant, who was the assessor of such property, assessed it for the same year, 1870, at a valuation of \$10,000 and upon the plaintiff's refusing to pay the tax there the defendant seized sixty-five cords and upwards of the wood to satisfy the tax thus levied by him. The plaintiff damages in the sum of \$1,000.

Complaint was filed on February 24th, 1871; the answer on March 1st, 1871. The transcript did not contain the summons or return of service, or any entry of default; but it appeared from the court minutes included in the statement on appeal, that on March 1st, 1871, plaintiff moved the court below to enter the default against the defendant; and that the court having, theretofore, ordered all proceedings stayed until the filing of the remittitur in the former case between the same parties, (which order was entered upon the defendant's motion to dismiss this action) denied it.

In the cause came on for trial, plaintiff moved that defendant's demand for a jury trial in Ormsby County should be denied, and that the cause, if a jury trial were insisted on, should be re-

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moved to another county, on the ground that every taxpayer and juror in Ormsby County was pecuniarily interested in the cause and question involved. The motion was denied.

It was argued and admitted in open court that "the proceedings of the county assessors of Ormsby and Douglas counties as to the levying and collecting taxes on the wood and lumber mentioned in the complaint in their respective counties were regular, and that the issue to be tried in this cause was simply in which of said counties was the tax legally assessed and collected for the year 1870." And thereupon plaintiff moved for judgment on the pleadings, which motion was denied. There was a general verdict for defendant, and also answers by the jury to various special interrogations. There was no motion for new trial.

T. W. W. Davies and *D. W. Virgin*, for Appellant.

I. The denial of the motion for default was error. The action was commenced February 24th, and no answer or demurrer was filed until April 22d. It is true defendant appealed generally, and filed a *motion* to dismiss the action on the ground of former adjudication, within ten days after the commencement of the action, but such motion was denied on the ground that such practice was unwarranted, and that the matter of former adjudication must be pleaded and proved. When that motion was denied, and plaintiff moved for the default, the time for answering having long expired it was error to deny it and allow defendant time to answer. Stat. 1869, 203, Sec. 38; *People v. De la Guerra*, 24 Cal. 73.

II. It was error to deny the motion for a change of venue, and force plaintiff to try his cause before a jury of taxpayers of Ormsby County, who had a direct pecuniary interest in the issue. Hob. 8

III. After the admission of counsel in open court as to the regularity of the proceedings of the assessor of Douglas County, it was error to deny plaintiff's motion for judgment on the pleadings.

IV. The taxes were not only first assessed in Douglas County but were paid before the property was suffered to be removed from that county; and the previous payment of taxes on this property evidenced by the tax receipt, ought to have been a complete answer.

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the claims of Ormsby County. *People v. Holladay*, 25 Cal. 6.

V. It was error to submit to the jury various questions which were not in issue ; because the admission of counsel that the single issue presented in the case was in which county was the tax legally assessable, and that the acts of the county assessor of Douglas County were regular, precluded any inquiry on the part of the jury as to any point except as to the value of the wood sold, and other damage.

[Counsel made various points in reference to the findings and weight of evidence ; but as the court declined to consider them on account of the want of a motion for new trial, they are omitted.]

Robert M. Clarke, for Respondent.

I. The transcript does not show any facts or grounds in support of the motion for default. There is no certificate of the clerk or other evidence that default existed. This court will, therefore, not disturb the order denying the motion.

II. The denial of the motion for judgment on the pleadings was proper, because it appeared upon the complaint that the wood and lumber assessed was in transition from California to market in Nevada, at the date of the assessment ; because the answer averred material affirmative matter and denied all the material averments of the complaint ; and because the denial of damage alone tendered the issue to be tried by jury, and was of itself sufficient to prevent judgment on the pleadings.

III. The motion for change of venue was properly overruled, because Ormsby County was not a party to the suit, and the interest of a juror as a citizen of the county does not disqualify.

IV. The wood was not subject to taxation so long as it was in transit, nor until it became incorporated with the mass of property in the state. *Brown v. Maryland*, 12 Wheaton, 442 ; *Smith's Case*, 341 ; *Cooley's Const. Lim.* 582 ; *Crandall v. Nevada*, 6 Wallace, 35 ; *The Victoria*, 6 Wallace, 382. The property had not reached its destination. It was yet in transition. To subject

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it to taxation, whilst in process of transportation, must inevitably result in imposing restraint upon commerce.

By the Court, LEWIS, C. J. :

That the evidence does not sustain the verdict and special findings of the jury in this case is a point which cannot be considered, for the reason that no motion for new trial was made in the court below. This has been so frequently decided by this court that it is now unnecessary to discuss it.

We will notice the questions which are properly raised upon the record in the order in which they are presented by counsel: and first, that the court erred in denying plaintiff's motion to enter the default of the defendant and render judgment thereon.

I. It is a sufficient answer to this point that there is no showing in the record that a default existed, and it certainly cannot be presumed as against the action of the court below. But independent of this, if the defendant was in default, it was a matter much in the discretion of the judge below to allow the filing of an answer after the time prescribed by statute, especially as no default had been entered, and there was no showing that the failure to plead had occasioned any delay or injury to the opposite party.

II. The court did not err in refusing a change of venue. It is no ground for such change that the people of the county where the action is to be tried are generally interested in the question involved. It is quite manifest from subdivision fifth of Section 164 of the Practice Act, that such interest does not amount to a disqualification. But, independent of the statute, it is always so held.

III. The motion for judgment on the pleadings was also properly denied. All the material facts of the complaint are certainly denied by the answer. The question at issue between the parties was, whether the plaintiff's property belonged in the county of Douglas, so that it might be taxed there at the time the assessment was made by the proper officer of that county. The defendant claims that it was not, but that it was simply in transit through that county, and destined for the county of Ormsby, where it was finally brought and assessed by him. All the necessary facts sus-

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ing this conclusion are alleged in the answer, and thus the is fairly presented as to whether the property belonged in Douglas County and was legally assessable there. The admission counsel was simply that the mode of assessment pursued by the assessor of Douglas was regular, not that the property was properly assessable in that county. The motion for judgment on the pleadings was, therefore, properly denied.

V. We do not see that any fact was submitted to the jury which was not in some way in issue between the parties. Indeed, the issues so submitted bear upon the main question in the case, namely: whether the property in question could properly have been assessed in Douglas County. But, even admitting that irrelevant issues or facts admitted by the pleadings were so submitted; if the plaintiff was not prejudiced thereby he has no substantial ground of complaint. And it is not shown here in what manner he is prejudiced by the irregularity complained of.

VI. As we cannot look into the evidence, the special verdict of the jury must be accepted as fully supported by it; and the findings of facts clearly show that the property was not assessable in the county of Douglas. The statute requires or authorizes the assessment of all property in the county during a certain time in each year. Now, what property is to be understood as being in the county? Can it be said that such as is simply passing through the county for the purpose of finding a market elsewhere, or is destined for some other county in the state, is property in the county through which it is passing for the purpose of taxation? Certainly not. To constitute it property for that purpose in any particular county, it must be in such situation as to make it a part of the wealth of the county; it must belong in it; must be incorporated with the other property of the county. Here it is found that the plaintiff was not a resident of the state of Nevada even at the time of the assessment in Douglas County, and that the property was simply in transit to the town of Empire, in the county of Ormsby. In such a case, it was manifestly not property taxable in the former county. See the case of *Hays v. The Pacific Mail Steamship Company*, 10 Nev. 597, which was an action growing out of an assessment

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and taxation of the steamers of the company in California, the vessels being owned and registered in New York, but plying between Panama and San Francisco, it was held that they were not subject to taxation in California, upon the ground that it had no jurisdiction over them for the purpose of taxation, the court saying that they were satisfied the state of California had no jurisdiction over these vessels for the purpose of taxation; that they were not properly abiding within its limits so as to become incorporated with the other personal property of the state, they were then but temporarily engaged in lawful trade and commerce, with their *situs* at the home port where the vessels belonged, and where the owners were liable to be taxed for the capital invested. See also *St. Louis v. The Ferry Company*, 11 Wallace, 423.

The rule which would justify the taxation of this property in Douglas County under the facts found by the jury, would authorize the taxation of all property temporarily remaining in a county while being transported through by railroad or some other mode of conveyance to another point. Such is not the law, nor will the statute warrant that construction.

Judgment below affirmed.

THE STATE OF NEVADA EX REL. DAVID STOUTMEYER v. JAMES DUFFY ET ALS.

NEGROES IN THE PUBLIC SCHOOLS—MANDAMUS. Where the trustees of a public school refused to admit a negro, between the ages of six and eighteen, and a resident of the district, as a pupil into such school: *Held*, that an application for mandamus to compel such admission should be granted.

EXCLUSION OF NEGROES FROM PUBLIC SCHOOLS UNCONSTITUTIONAL. Section 50 of the school law, (Stats. 1867, 95) in so far as it excludes negroes from the public schools, is unconstitutional.

POWER OF SCHOOL TRUSTEES TO "CLASSIFY" PUPILS. While school trustees cannot legally deny to any (such as a negro) resident person of proper age an equal participation in the benefits of the common schools; yet it is entirely within their power to send all blacks to one school and all whites to another; or, in other words, to make such classification, whether based on age, sex, race or any other existent condition as may seem to them best.

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his was an original application to the Supreme Court on the petition of David Stoutmeyer, a colored minor appearing by his father and natural guardian, Nelson Stoutmeyer, for a mandamus requiring James Duffy, S. H. Wright and M. C. Gardner, the board of trustees of the public schools in school district No. 1, in Esmeralda County, to admit him into the public schools of that district.

The petition set forth that David was seven years of age, a resident of the district, cleanly and neat in his habits, orderly in deportment, tractable in his disposition, and ready cheerfully to obey and conform to all the laws, rules, usages, customs and discipline of the schools; that on April 10th, 1871, he, through his father and natural guardian, presented a written application to the trustees for admission to such schools; and that they had failed to admit him.

W. W. Davies, for Relator.

The constitutional and statutory provisions regulating the apportionment and distribution of the school moneys among the various counties and school districts of this state, have invariably made the number of children, irrespective of race or color, the basis of apportionment. It is clear that any apportionment on such a basis would be unequal, unfair and unjust, unless *all* the children, for whom money is received, are allowed the benefits of instruction in the public schools supported and maintained by such moneys; and it would be unreasonable to allow money for the education of children in the public schools who are denied admission to the same.

of Nev., Art. XI, Sec. 3; Stats. 1861, 274, Sec. 2; 1862, Sec. 4; 1869, 172, Sec. 32; 1869, 173, Sec. 38.

Section 50 of the school law, (Stats. 1867, 95) denying admission to the public schools, is unconstitutional and void.

It is in conflict with the constitution and laws of the United States. U. S. Con. Amendment, 14; 5 How. 410; 7 Peters, 469; 10 How. 507; 18 How. 71; 18 How. 591; 2 How. 84; 7 Wall. 27; Laws of the United States, 39th Congress, 1865-6, 27, Secs. 1 and 2; U. S. Stats. 1869-70, 144, Sec. 16; U. S. Stats. 41st Congress, 3d ses.; 42d Congress, 1st ses. No. 17, 295, Secs. 1

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and 2. If all citizens are entitled to the *same* rights, privileges and immunities, certain rights cannot be legally accorded to one class or race of citizens, and denied to another. The section is also in conflict with that provision of the United States and state constitutions which declares that no person shall be deprived of property without due process of law, for the reason that the right to attend the public schools and receive instruction is a property right, capable of being estimated in money. *Ex parte Garland*, 4 Wall. 344.

III. Section 50 of the school law is also in conflict with Art. XI, Sec. 2 of the state constitution, which requires the provision by the legislature of a uniform system of common schools, by which a school shall be established and maintained in each school district, and such laws as will secure a general attendance of the children in each district upon said public schools.

IV. The school law in as far as it legislates against a race or class of citizens on account of their color, is in the highest degree unjust and should be declared invalid and void. If the legislature may exclude colored citizens from the public schools, there is no limitation to their power. The question is one of power, and if we admit the power to exclude from the public schools, we must admit the power in its whole extent, as a power complete in itself, to be exercised at the discretion of the legislature and subject to no limitation or restraint, and colored citizens may be excluded from holding office, sitting on juries, visiting places of public entertainment, and the like.

V. The separation of the children in the public schools, on account of race or color, is in the nature of caste, and is a violation of equality. It is clear that the trustees may classify scholars according to age and sex, for these distinctions are inoffensive and recognized as legal; or according to their moral and intellectual qualifications, because such a power is necessary to the government of schools. But the legislature cannot assume, without individual examination, that an entire race possess certain moral or intellectual qualities, which renders it proper to place them all in a school by themselves. Nor is it any good answer to say that separate schools

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established for their instruction, because such separate are not the public schools designed by the constitution.

The attempt to discriminate against and to abridge and impair the rights of colored citizens, comes with bad taste from the Nevada. It will be remembered that this state was in the midst of a great war, fought for the enfranchisement of the negroes and for the establishment of the great doctrine that all men are free and equal, and that, in that contest, this state fully supported that doctrine. It will be further remembered, that this state, with the utmost alacrity, ratified the fourteenth and fifteenth amendments to the United States Constitution, the object and intent of which were to declare and fix the equality of all men before the law.

Ellis and *R. M. Clarke* argued the case orally on behalf of the respondent.

MITMAN, J. :

The applicant asks a mandamus compelling defendants to admit him to a public school of which they are trustees. They object that the remedy sought should not be granted, first: because they do not have the power to admit, nor to deny admission; second: because the applicant is a negro.

The power to admit to the public schools is not in words conferred upon the trustees in this state, but it is so inseparably connected with the specified powers, and so inevitably a conclusion therefrom, that no argument is needed to prove its necessary existence. *14 Nev. 413; 1867, 89.* The trustees have general control and management; and while they may not see fit to require any applicant to obtain from them an order of admission, they have the power to make such a regulation; and upon the face of the law, every person qualified under the law to attend the public schools is entitled to such an order upon due demand.

The question then is, what qualifies a person to receive such an order? The applicant must be over six and under eighteen years of age, and ordinarily a resident of the district where admission is sought. So being, it is contended for the relator that admission fol-

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lows as of absolute right. While it would probably be unsafe to admit the proposition in its stated breadth; as it might be subject to qualification by reasonable rule, as to moral obliquity or mental incapacity; it may be accepted for this case, wherein it is unnecessary to look minutely into the matter, as the only ground for refusal here was the race of the applicant. The trustees yield obedience to the statute, which prescribes that "Negroes, Mongolians and Indians shall not be admitted into the public schools, but the board of trustees may establish a separate school for their education, and use the public school funds for the support of the same." Stats. 1867, 95, Sec. 50. To this relator replies, that such statute is opposed to the constitution and laws of the United States; and to the constitution of the state of Nevada.

While it may be, and probably is, opposed to the spirit of the former, still it is not obnoxious to their letter; and as no judicial action is more dangerous than that most tempting and seductive practice of reading between the written lines, and interpolating a spirit and intent other than that to be reached by ordinary and received rules of construction or interpretation; such course will be declined, and reference at once had to the constitution of this state. What says that? "The legislature shall provide for an uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year; * * * and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public school." Const. Art. XI, Sec. 2. It is further provided in that article, of certain pledged revenues, that "the interest thereon shall, from time to time, be apportioned among the several counties in proportion to the ascertained numbers of the persons between the ages of six and eighteen years in the different counties, * * * " Section 3.

These are the only references made to, or, designation of, the beneficiaries of the school fund. Either something or nothing is provided as to such. If the constitution provides anything in the language quoted, it provides for the education of all children of the state, between the ages of six and eighteen years; by means

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an uniform system of common schools, open six months at least every year, and that the legislature may legislate to secure a general attendance thereon. Waiving the point that "may" should read "shall" in the last sentence; yet when the legislature has acted, can it be said to have done so in accordance with the constitution when it prohibits the attendance of any children within the stated ages upon the schools erected as common schools, and supported by the funds pledged thereto? Can such schools be schools common to all children of appropriate age; or upon an uniform system, when any such children are excluded? It may be said that the constitution nowhere in express terms provides for the education of all children within certain ages. If so, then it nowhere provides for the education of any. If any are provided for, then all are. If all are not, then none are; and the legislature may divert from the education of youth between the ages of six and eighteen, and expend upon the entire community, or upon any portion it may see fit, the funds which it has been universally supposed were solemnly and irrevocably pledged to the former purpose. Of course this possible result does not prove anything of itself; but its contemplation may serve to turn the otherwise unwilling mind to a natural construction of the constitutional language. If the reading suggested be the proper one, and I think it is, then the action of the legislature in passing Section 50 of the school law quoted was unconstitutional; and the trustees erred when they conceived themselves bound thereby and acted thereunder, as the same was void.

My conclusion is that certain funds are pledged and certain taxation allowed for the support of common schools, which are public and open to be enjoyed by all resident children between the ages of six and eighteen years; subject, perhaps, to some qualification as before suggested. So it has been held in Massachusetts under a constitution no more specific upon the subject than that of this state, and in Michigan under a statute similar to the one under consideration, minus its fiftieth section. *Roberts v. Boston*, 5 Cush. 198; *People v. The Board of Education of Detroit*, 18 Mich. 400. This general position is, however, to be taken subject to the very great powers of the trustees to arrange and classify the schools

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as they deem for the best interest of the scholars. While on the one hand they may not deny to any resident person of proper age an equal participation in the benefits of the common schools; and while in the present case upon the facts presented, the defendants should have admitted the relator into the public school in question; yet, on the other hand, it is perfectly within their power to send all blacks to one school, and all whites to another; or, without multiplying words, to make such a classification, whether based on age, sex, race, or any other existent condition, as may seem to them best. *Van Camp v. Board of Education of Logan*, Y. O. S. 406; *Roberts v. Boston*, 5 Cush. 198.

Whether it be well or ill to classify or divide, on either or all of the conditions suggested, or upon any other, is entirely within the discretion of the trustees, acting intelligently within their power.

I think the mandamus should be ordered.

By LEWIS, C. J., concurring specially.

I cannot concur in the view taken by my brother Whitman, that section of the constitution upon which his conclusion is founded; but it is very clear to my mind that the act in question, so far as it prohibits the admission of negroes to the public schools, is in direct conflict with Section 21 of the constitution, which declares that "all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state."

One of the great fundamental principles underlying our government, as indeed it must be an indispensable element of all truly republican governments, is, that every citizen is equal before the law, being entitled to all the protection which it grants to life and property, and all the immunities and advantages which it may afford for culture or the amelioration of the condition of any individual or class. This has always been recognized as an essential principle of our form of government, not only by the theoretical writers upon the subject, and by all the distinguished statesmen of our country, but is the uniform language of the courts wherever the question is brought before them. Cicero tells us that the force of law consists in its being made for the whole community. Rousseau, that "it is precisely because the force of things tends always to destroy equal-

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ity that the force of legislation ought always to tend to maintain it." Locke, speaking of the law-making power, says: "They are to govern by promulgated established laws — not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plow." And this, says Cooley, "may be justly said to have become a maxim in the law by which may be tested the authority and binding force of legislative enactments." Constitutional Limitations, 392.

And again says this author: "Equality of rights, privileges and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed the legislature designed to depart as little as possible from this fundamental maxim of government. The state, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are obnoxious, and discriminations against persons or classes are still more so; and, as a rule of construction, are always to be leaned against, as probably not contemplated or designed."

"The rights of every individual," say the court, in *Wally's Heirs v. Kennedy*, "must stand or fall by the same rule or law that governs every other member of the body politic or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law, and the mass of the community and those who made the law, by another; whereas, the like general law, affecting the whole community equally, could not have been passed." 2 Yerg. 554.

Again, in the case of *Lewis v. Webb*, 3 Greenleaf, 326, the court use this language: "On principle, it can never be within the bounds of legitimate legislation to enact a special law or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man by way of exemption from the operations and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government

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of law and not of men, but this can hardly be deemed a blessing unless those laws have for their immovable basis the great principles of constitutional equality."

This is the great foundation principle of government, the abrogation of which must inevitably end in the ruin and destruction of our institutions. To maintain it as far as possible was undoubtedly the purpose of the section of the constitution above quoted. Why else require all laws, so far as practicable, to be general and uniform throughout the state? No other object is manifest except to give to all citizens the equal advantage of the laws, to deprive the legislature as far as possible of the power of creating distinctions, and granting immunities and exemptions to one class of citizens over another. Nothing can be conceived more obnoxious or antagonistic to this principle than the law in question. It deprives an entire class of citizens of one of the most inestimable privileges of political organization; makes the most invidious discrimination against them, exacting a revenue from their property for the organization and support of public schools, and denying them their advantages; holding them amenable to the law, but withholding from them its highest privileges.

Thus it is manifest that the law, so far as it discriminates against a class of citizens, is at least opposed to the spirit of the constitutional clause referred to. But is it opposed to the letter? To determine this it is necessary to ascertain whether the act is a general law, within the meaning of the constitution, and if not, then could a general law "be made applicable." Sedgwick, defining general and special statutes, says: "Public, or general statutes are, in England, those which relate to the kingdom at large. In this country they are those which relate to or bind all within the jurisdiction of the law-making power, limited, as that power may be, in its territorial operation or by constitutional restraint. Private or special statutes relate to certain individuals, or particular classes of men." In *Holland's case*, 4 Rep., we find a full discussion of this question. After stating the rule to be that an act is special which does not include the genus, but only the species or individuals, Coke says, in illustration of the rule: "So, mystery or trade is a general word, trade of grocery is special, and the

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grocer, by name, is *individuum*; and, therefore, acts of parliament concerning mysteries or trades are general, but an act of parliament concerning the trade of grocer is a special act, as it is said, 28 L. 8 Dyer, 27; because the trade of grocers contains under it not *individua* or singular persons, as this or that grocer by name"

* "But an act concerning all the nobility, or lords of the parliament, or all the bishops of England, or all corporations made by King Henry VI, are special and particular acts." Again: "So, observe what act to persons is general and what not. Now, know that although the matter is special, so that under it there are but *individua*, yet if it be general as to persons, thereof the judges shall take cognizance; but if the act concerns *àliquod singulare, seu individuum*, although it is general as to persons, yet the judges shall not take cognizance thereof."

I am not aware that the correctness of the general rules stated by Lord Coke in this case has been questioned, although many cases have been found where they have been misapplied. Still, the general rule is universally recognized, that a law which does not embrace all persons in the same situations or conditions, is a special law. Whenever the courts maintain a law passed for the regulation of some local or special subject, it will be observed it is done upon the ground that, although local or special in some respects, it in some way affects the entire people, or from the very nature of the subject of legislation a general law would manifestly be inapplicable. I have been unable to find any case which has held an act to be general, which extended a privilege to one class of citizens to the exclusion of others in like circumstances. To make the law general it is not perhaps necessary, under the rule of Lord Coke, that it should include all persons within the jurisdiction of the law-making power, but only that it embrace all who are in like condition, or who are embraced within a class designated by circumstances peculiar to itself. But what are the circumstances which are generally recognized as creating such class? Only age and sex, or such as *naturally* result from the social state, as the circumstance of trade, employment, profession, or the like. These conditions are the natural fruits of the political compact, depending upon no act of legislation for their creation, and such are the class

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distinctions which are generally recognized by the law. In these cases, all the persons included in the class would, under Coke's rule, constitute a genus, and therefore a law including the entire class would be general, according to the case put by him of a law respecting trades, or the spirituality. But to say that any physical peculiarity, outside of that of sex, which is universally recognized, is sufficient to designate such class, is simply ridiculous. If so, the legislature might confer certain rights and privileges upon all persons possessing certain physical characteristics, to the exclusion of all others; as, for example, those having hair of a certain color, or who might be of a certain stature, and so on, dividing the people into classes by trivial distinctions, and then adopt legislation as various as the classes, and as unequal and discriminating as it might choose. That the legislative department of this state has the authority to do so will not be claimed by any person familiar with our organic law. But the legislature has no more right to designate a class by the color of the skin, than by the color of the hair. Negroes, possessing all other qualifications, are, by the highest law of the land, citizens of this state. No law now in force, or which we are bound to recognize, places them in any different position, so far as citizenship is concerned, to any other class of citizens; (the constitutional provision of this state excluding them from the right of suffrage, being now admitted to be a dead letter, obliterated in fact, as if it had never existed) they follow the same pursuits, are engaged in the same employments, may be members of the same professions, are in fact in no way marked or distinguished as a class, except by the one physical characteristic mentioned; but that alone is not, by any law or decision that has come to my knowledge, sufficient to classify them so that a law can be called general which simply embraces them, to the exclusion of all others, or embraces all others, excluding them. I conclude the law is not general which does not embrace all persons similarly situated or conditioned, and that the mere matter of color does not place a negro in a condition or situation which, in legal contemplation, is different from other citizens. It is no answer to say, that age and sex are no more distinctive characteristics than color, and therefore that the rule which authorizes a classification by reason of

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those characteristics will equally authorize a classification by color. Any classification whatever is obnoxious to the principle of equality which I have suggested, and is only, as Cooley says, permissible when unavoidable ; hence classification should not be extended further than is absolutely necessary. Age and sex have always been marks of classification, both by the laws of this country and England, and are recognized by the constitution of this state, and laws passed including all persons of such classes have uniformly been held to be general. We cannot, therefore, disregard such decisions and the classifications of our own constitution, but we can refuse to make further classifications, which seem utterly unnecessary and unjust.

However, although it be not a general law, it becomes necessary still to determine whether the subject matter be such as will admit of the passage of any but a special act. It will be seen the constitution requires all laws to be general and uniform throughout the state when such laws "can be made applicable." That this imposes the duty upon the legislature of adopting general laws where they can be made applicable, there is no question ; the difficulty exists in determining what is to be understood by a law being applicable. The thing to which it is to be applicable is evidently the subject matter of legislation. It could not be said to be applicable to anything else.. But what is to make a law applicable to the subject of legislation ? The general definition of this word applicable is suitable, proper, appropriate, adapted.

A general law, then, can only be applicable, suitable or appropriate, when the subject concerning which the law treats or which calls for the legislation is general in its character ; that is, a subject in which the entire people or class legally recognized as such have an interest. If the subject of the law, independent of the law itself, be purely local or special, in which the people at large have no interest, then clearly a general law would be inapplicable and uncalled for ; it would be legislating for all the people, when the situation or condition of only a few demanded it. But if the subject of the law be one in which, from its very nature, the whole people are interested, then the legislature is required to enact a general law. To illustrate : the subject of removing the county seat

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of any particular county from one locality to another is clearly a subject in which none but the people of the particular county are interested; or the case where a particular county desires to aid a railroad which is beneficial to itself alone; in neither case are the people of the state at large interested in the subject; a general law, therefore, would be utterly inapplicable to the subject matter, that is, the subject not being general, a general law would not be called for, and if adopted, would be practically inoperative in most of the state, or perhaps, operate mischievously. But the case of taxation for the purpose of carrying on the state government, the manner in which claims shall be allowed or paid by the state, and kindred matters, are subjects, the very nature of which suggest general legislation, because all the people are directly interested therein. Many similar subjects might be mentioned, but these will suffice to illustrate the construction. This interpretation is that most obviously warranted by the language of the constitution, and I think will avoid the ridiculous result of forcing the legislature to enact general laws when the subject of legislation is purely and manifestly local or special on the one hand, and the equally unhappy result on the other of allowing the legislative body to be the final judge of whether a law can be made applicable. So in effect, interpreting this injunction of the fundamental law to mean nothing but that general laws shall be passed when the legislature may think proper. With the view which I take of this clause, if the subject matter respecting which a law is passed is clearly of general interest, then the judicial department has it in its power to force general legislation respecting it in conformity with the constitution; but if not clearly of such character, then in accordance with the rule universally adopted, the action of the legislature would not be interfered with.

Can there be any doubt but the subject of education, or the control and management of the public schools, and the question as to what children shall or shall not be admitted to the privileges afforded by them, are matters of general interest? No question can be suggested in which the entire people of the state are more generally concerned. It is confined to no class, race, or locality. All who pay taxes at all contribute to the establishment and support

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the schools, and as one of the most inestimable blessings of the civil compact, all are interested in the enjoyment of the advantages which they afford. This is a subject, then, which most clearly calls for general legislation and none other. In that the law in question denies the privilege to one class of citizens to have their children educated at these schools, it is special, and is so far void. A law including all *citizens* of the state would, doubtless, be a general law, as it would, perhaps, embrace all for whom legislation can be demanded in this state. At least, citizenship constitutes a distinctive class recognized by the constitution of the state, and is an universal mark of classification in all governments. However, it is sufficient in this case to say that whether a law which includes all *citizens*, or the children of all citizens, although expressly excluding those who are not so, may not be a general law is not decided.

As to the power of the trustees to classify scholars, putting some in one building or school and others in another, I fully agree with Judge Whitman. So long as the same advantages of education are given to all, such classification would not interfere with the constitutional principle upon which I place my conclusion.

I therefore concur in issuing the writ.

By GABBER, J., dissenting.

In the oral argument of this cause, it was not suggested that the statute in question was in conflict with any provision of our state constitution. The case of the relator was sought to be maintained on the ground that the statute was in violation of the fourteenth amendment to the constitution of the United States. I fully agree with my associates that this position of counsel is utterly untenable. The statute does not abridge any privilege or immunity of the applicant, who is a citizen of the United States. The privilege of admission to the common schools of this state is no more inherent in or connected with the *status* of citizenship than is the elective franchise; and to secure that against unfriendly state legislation, an additional amendment was required and was proposed. This privilege is not embraced within any meaning which has ever been attributed to the

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words "life, liberty or property," and the equal protection of the laws cannot well be denied to a right which never existed.

I also quite agree with Chief Justice Lewis, that the eleventh article of our state constitution contains no provision in the slightest degree affecting the validity of this statute. The provision that the legislature *may* pass laws tending to secure a general attendance of children, was simply intended to affirm the power of the legislature to provide for compulsory education, in case the adoption of such a system should be deemed expedient. Such laws, elsewhere enacted, have been declared to be unconstitutional; and the evident and only object and scope of the provision was to set at rest the question of legislative power in this regard. It is argued that, because the school funds are directed to be apportioned in proportion to the numbers of *all* persons between certain ages, therefore *all* such persons must be admitted to the schools. This seems to me a most unwarrantable conclusion. If any principle of constitutional construction can be said to be well settled, it is that the courts cannot declare any limitation of the general powers conferred upon the legislature, except those imposed by the fundamental law, either in express terms or by necessary implication. Had the intention been to compel the education of all, it is but fair to the framers of the instrument we are construing to suppose that language would have been at their command to express that intention. But it is evident that no such idea was in their contemplation. What they were seeking for, they found—namely, a rule of apportionment which would most nearly, in its practical operation, approximate a division of the fund according to the educational necessities of each county. The argument, if it proves anything, proves too much—for, under this construction, no discrimination whatever could be made. The blind, the idiotic, the insane, the vicious and the diseased must all be admitted; and if "may," in the preceding section, is to read "shall," then the whole school law is void, because it fails to accord to the Shoshone infants their constitutional privilege of compulsory education.

The cases cited from Massachusetts and Michigan are wide of the mark. In that from 5 Cushing, the question presented is thus stated by Chief Justice Shaw: "Conceding, therefore, in the full-

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est manner, that colored persons, the descendants of Africans, are entitled by law in this commonwealth to equal rights, constitutional and political, civil and social, the question then arises whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights." In answering this question, he says: "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, *is not created by law*, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinions and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence; and we cannot say that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment. The increased distance to which the plaintiff was obliged to go to school from her father's house, is not such, in our opinion, as to render the regulation in question unreasonable, still less illegal." The case from 18 Mich. was decided in obedience to a statute expressly providing that all residents of any district should have an equal right to attend any school therein.

The next question is, whether this is a special law. This term is used in the constitutions of many of our sister states, and their courts are generally, if not universally, in accord as to its meaning. In a late Iowa case, the court say: "A law applying to all railroad corporations is just as general and uniform as it would be if it applied to all common carriers. Very many laws, the constitutionality of which is not doubted, do not operate alike upon all citizens of the state. These laws are general and uniform, not because they operate upon every person in the state, for they do not; but because every person who is brought within the relations and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation; and the fact of their being general and uniform is not affected by the number of

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persons within their scope and operation. 20 Iowa, 343; *vide* 2 Ib. 374; 27 Ind. 95; 14 Barb. 563.

In Maryland, it is held that all that is required to make a statute general, as distinguished from special, is that it shall apply to all persons within the territorial limits described in the act; that the object of the constitution, in prohibiting special as distinguished from local legislation, was to prevent the abuses that occurred from the great multiplicity of laws passed for particular and individual cases, and not to prevent legislation to meet the wants of communities less extensive in their territorial limits than the state. 29 Md. 521; *vide* 58 E. C. L. Rep. 620. According to these authorities, the statute in question is clearly a general law, and we do not understand Judge Lewis as dissenting from the principle they enunciate. But he contends for an additional element in the definition of a general law, the existence of which, it seems to us, may be conceded for the sake of the argument, without prejudice to the conclusion that this statute falls strictly within that definition. It is not denied that the legislature may classify persons by age, occupation, residence, or the like, but it is said that it cannot make or adopt novel and arbitrary classifications; that all persons are to be deemed in the like situation, between whom there exists neither a substantial distinction, nor a distinction which has been customarily recognized, or which precedent has sanctioned as warranting this sort of discriminating legislation. It is then assumed that the only difference between a negro child and a white child lies in the color of the skin; and on this assumption it is argued that this statute introduces a classification entirely novel and arbitrary. The fallacy of the argument is patent. It singles out the most trivial and unimportant of the marks of distinction between the two races. The other and vital ones—those the existence of which alone induced the legislature to enact this section of the statute—are ignored. I find them well stated by an eminent judge in an opinion written about the time this statute was passed, and which affirms the right of a public carrier to separate his passengers by the characteristic of color. He says: "The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is

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whether there is such a difference between the white and black races within this state, resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar; with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is, therefore, an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. The right of these widely separated races to be free from social contact is as clear as to be free from intermarriage. * * * Law and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away. We cannot say there was no difference in fact, when the law and the voice of the people have said there was. The laws of the state are found in its constitution, statutes, institutions and general customs. It is to these sources judges must resort to discover them. If they abandon these guides they pronounce their own opinions, not the laws of those whose officers they are. Following these guides, we are compelled to declare that, at the time of the alleged injury, there was that natural, legal and customary difference between the white and black races in this state which made their separation as passengers in a public

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conveyance the subject of a sound regulation to secure order, promote comfort, preserve the peace and maintain the rights of both carriers and passengers." 55 Penn. 213.

I understand Judge Lewis to admit that the legislature can exclude all females; such a statute would not be special, according to his definition. Yet it certainly cannot be maintained that, so far as the right to an education is concerned, there is any more substantial difference between a white boy and a white girl, than between a white and a negro child. It is said that the one is a customary and the other a novel classification. But is this so? At the time this statute was enacted, and when our constitution was adopted, the negro was not a voter; he could not hold office; he could not testify in a civil case where a white was a party; and the intermarriage of the two races was unlawful, and the solemnization of such a marriage a misdemeanor. In the language of Judge Agnew: "Under the constitution and the laws, the races stood in separate relation to each other. The same difference is found in the institutions and customs of the state. There had been no intermixture, socially, religiously, civilly, or politically."

So far from being a novel classification, it was not only known to and recognised by our own constitution, statutes and customs, but was almost universally made the basis of legislation throughout the United States. In Indiana, for instance, under a similar constitutional inhibition of special legislation, negroes were long prohibited from testifying, by a statute the constitutionality of which was never assailed: It is admitted that we cannot disregard the classifications of our own constitution, and it cannot be denied that there is no one of them more prominent than that which gives to the white the privilege of voting and holding office, and denies the same privilege to the negro. Hence it inevitably follows that, when this statute was approved, it was a valid and constitutional law. How, then, has it become void? Not, it is conceded, because it is now, any more than it was then, repugnant to any provision of the laws or constitution of the United States—not by any amendment of our own. By what other process a statute, constitutional when enacted, can have become unconstitutional, I cannot imagine. Suppose a sixteenth amendment should be adopted, declaring that

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tate shall deny to females the right of suffrage: would that render all our statutes which apply to females alone, unconstitutional? No one would contend for such a proposition; yet the argument would be the same as that here used in behalf of the negro. It could be then urged with equal force, that females are citizens; stand, as to citizenship, in the same position as any other class of citizens; that the word "male" is obliterated from our constitution as if it had never existed; that they follow the same pursuits, may be members of the same professions, and are, in fact, no way marked or distinguished as a class, except by physical characteristics, &c. The argument, as applied either to the case before us or the one supposed, virtually asserts the novel doctrine, that a statute once valid can be declared invalid, by the application of the maxim, "*cessante ratione legis, cessat et ipsa lex.*" But the reason has not ceased. The distinguishing characteristics of the races remain the same. Nor has the word "white" been obliterated from our constitution. It remains, and with it is retained the ineligibility to office of all unqualified electors *under that constitution*. This "classification of our own constitution" is wholly without the scope of any of the amendments relied upon.

It seems to have been assumed throughout, that the statute *excludes* negroes from the public schools; but if the alternative be, either to declare the section void, or to construe it as positively commanding the board of trustees to establish a separate school for the education of negroes, the latter course should be adopted. The rules on this subject are thus expressed by the text writers: "As a conflict between the statute and constitution is not to be implied, it would seem to follow, where the meaning of the constitution is clear, that the court, *if possible*, must give the statute such a construction as will enable it to have effect. This is only saying, in another form of words, that the court must construe the statute in accordance with the legislative intent; since it is always to be presumed the legislature designed the statute to take effect, and not to be a nullity. Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall." The words shall or may are to be construed as imperative in all cases where a public body or officers have been

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clothed by statute with power to do an act which concerns the public interest or the rights of third persons ; and, in such cases, the execution of the power or the doing of the thing required may be insisted on as a duty, though the phraseology of the statute be permissive merely, and not peremptory." The section in question, as originally enacted in March, 1865, provided that "the board may establish a separate school for the education of negroes, *if deemed advisable by them.*" As amended, and as it now stands, it simply provides that the board may establish such separate school. This omission, *ex industria*, of the language expressly leaving the matter to the discretion of the board, is significant ; and, though not in itself conclusive, so strengthens the presumptions of legislative intent suggested by the rules of construction above quoted, as to demonstrate the possibility of construing the statute as imperative. Hence it would follow, that the duty enjoined upon the trustees is to establish a separate school,—not to admit the applicant to that already established ; and as the writ can only issue to compel the performance of the duty enjoined, and not to compel the doing of what the law prohibits, it results that, by awarding the writ, this court, to all intents, decides that the legislature is deprived, not only of the power to exclude negroes from the common schools, but also of the power to provide for their education in separate schools ; and is compelled, either to give the sanction of law to the intermixture of the two races in the same school, or to deprive both races of all educational advantages whatever : a conclusion which, it seems to me, can only be arrived at by an equal disregard of principle and authority.

I think the mandamus should be denied.

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**SAMUEL MOSIER *et al.*, APPELLANTS, v. EDWIN CALDWELL
et al., RESPONDENTS.**

USE of WATER PERCOLATING INTO ONE'S OWN SOIL NOT ACTIONABLE. Where plaintiffs appropriated, possessed and used a spring of running water upon land which they occupied; and defendants dug a well upon adjoining land occupied by them; and the spring dried up after the digging of the well, but there was no visible connection between the well and the spring—the flow of water into defendants' land being by percolation: *Held*, that plaintiffs had no cause of action against defendants for damages or for an injunction.

RIGHT OF OWNER OF LAND TO DIG FOR WATER IN IT. A person may lawfully dig a well upon his own land, though thereby he destroy the subterranean, undefined sources of his neighbor's spring.

PERCOLATING WATER A PART OF THE SOIL. Water percolating through the soil is not, and cannot be, distinguished from the soil itself; and of such water, the proprietor of the soil has the free and absolute use, so that he does not directly invade that of his neighbor, or, consequently, injure his perceptible and clearly defined rights.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

Four different actions were commenced by the plaintiffs, Samuel Mosier and M. Guptil, two at law and two in equity. In one action, plaintiffs demanded damages in the sum of \$100 against James Wilson, and in another, damages in the sum of \$385 against Edwin Caldwell and Albert Caldwell, for diversion of water from their spring, at Hamilton City, in May, 1869. The other two actions were against the same defendants respectively, to restrain a continuance of the alleged diversion. By consent of attorneys, the decision in the Wilson case was to be the same as that in the Caldwell case; and a non-suit having been granted in the latter, the same judgment was entered in the former. Motions for new trial having been denied, all the cases were carried up on appeal by the plaintiffs in the same record.

Harry I. Thornton, for Appellants.

I. Could the defendants lawfully dig wells upon their own lands, within a few feet of and above the spring of plaintiffs, and thereby cut off from the spring its supply of water? They could not; be-

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cause the supply of waters to the spring came through a well-defined subterranean gravel channel from the lands of defendants, and this channel was intersected by the wells of defendants. The spring was perennial, flowing out in a stream upon the surface. The defendants located their lands just above the land and spring of plaintiffs, subsequent to the possession and use of the land and spring by plaintiffs, and dug their wells close to and above the spring, knowing that they would tap it and take away its waters into their wells. The spring was not fed by percolating waters from any source, but by the water flowing through the gravel channel. See Washburn's Easements and Servitudes, Ch. III, Sec. 7; *Smith v. Adams*, 6 Page, 435; *Roath v. Driscoll*, 20 Conn. 533; *Chatfield v. Wilson*, 28 Vt. 49; S. C. 31 Vt. 358; *Wheatley v. Baugh*, 25 Penn. St. 528; *Acton v. Blundell*, 12 Mees. & W., 336; *Dexter v. The Providence Aqueduct Company*, 1 Story C. C. R. 387.

II. Our accepted doctrine is, that an ownership in water can be acquired by prior appropriation and use. The act of the 39th congress, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," Section 9, operated as a legislative grant of this spring to Mosier and Gupta. They held the land under a presumed grant from the proprietor. The grant of the spring would be annulled and worthless if subsequent locators were allowed to take up the adjacent land, and by digging wells in it, cut off the water granted to Mosier and Gupta. All the land being public, the defendants hold their lands under a presumed grant from the common proprietor, but the grant to them was subject to the prior grant to plaintiffs of the water flowing out of it into the spring. See *Irwins v. Phillips*, 5 Cal. 145; *Carr v. Burnett*, 2 Hill, 620.

D. W. Perley, for Respondents.

I. The law is now as well settled both in England and in several of the United States, with regard to subterranean waters, as it is in California with regard to open running streams. See Washburn on Easements, Section 7; *Greenleaf v. Francis*, 18 Pick. 117; *Acton v. Blundell*, 7 Erch. 300; *Same v. Same*, 12 Mees. & Wel. 324;

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Cheesman v. Richards, 2 Hurlst & N. 168; *Hammond v. Hall*, 10 Sim. 551; *Roath v. Driscoll*, 20 Conn. 533; *Chatfield v. Wilson*, 28 Vt. 49; *Harwood v. Benton*, 32 Vt. 724; *Ellis v. Duncan*, 21 Barb. 250; *Radcliffe v. Mayor*, 4 Comst. 195; *Wheatley v. Baugh*, 25 Penn. 528; *Whetstone v. Bawser*, 29 Penn. 59; *Parker v. Boston & Maine*, 3 Cush. 107; *Trustees of Delhi v. Youmans*, 50 Barb. 316.

II. The transcript shows that the waters flowing into the plaintiffs' spring were entirely subterranean, and were supplied by percolation; that above the spring there was no water-course or defined channel of any kind; that the defendants exercised only a lawful right to dig wells on their own land, and that, if any damage thereby resulted to the plaintiffs, it was *damnum absque injuria*.

Harry I. Thornton, for Appellants, on rehearing.

[After discussing the testimony, counsel contended that there was sufficient evidence to justify the jury in finding that plaintiffs' spring was supplied by two defined subterranean streams, which were cut off by the wells of defendants; that if the same rule of law applies to cutting off subterranean streams that applies to diverting surface streams from the proprietor below, the court below erred in granting the nonsuit; and that, in view of the facts, the question was, whether a person could lawfully dig a well upon his own land, whereby he would cut off the defined subterranean stream supplying his neighbor's spring.]

D. W. Perley, for Respondents, on rehearing.

The question is not whether there was a gravel bed leading or connecting the well with the spring; but whether that bed was underground, invisible, subterranean, and its general course and direction wholly unknown; and whether the waters which flowed from one to the other (conceding, for the purposes of the argument, that they did so flow) were entirely subterranean. See also *Hanson v. McCue*, California Supreme Court, October Term, 1871.

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By the Court, WHITMAN, J. :

Appellants brought actions against Edwin Caldwell and Albe Caldwell, codefendants, and James Wilson. As the facts were similar in both cases, the judgment in one was agreed as the judgment in the other, and the cases are brought here substantially one. The actions were at law for damages for stopping the flow of water to appellants' spring; and in equity to restrain a continuance of the wrong.

The appellants proved the appropriation, possession and use of a spring of running water upon land occupied by them from May, 1868; the digging of wells by respondents upon land similarly occupied and possessed in May, 1869; the drying up of said spring after the digging of the wells; that no water appeared upon the surface of respondents' ground; that there was no visible connection between the wells and the spring—the flow of the water being by percolation. Upon this state of facts, respondents asked and obtained a nonsuit. From the judgment thereon, and from the order denying a new trial, this appeal is taken.

The question simply is: May one lawfully dig a well upon his own land, though thereby he destroy the subterranean, undefined sources of his neighbor's spring? That he may do so, is undoubtedly the settled law. The rule is thus given by Mr. Washburn: "It may be stated, as a general principle of nearly universal application, that while one proprietor of land may not stop or divert the waters of a stream flowing in a surface channel through it, so as to deprive a land owner, whose estate lies upon the stream below that of the proprietor first-mentioned, of the use of the same, or essentially impair or disturb the use thereof; if, without an intention to injure an adjacent owner, and while making use of his own land to any suitable and lawful purpose, he cuts off, diverts, or destroys the use of an underground spring, or current of water which has no known and defined course, but has been accustomed to penetrate and flow into the land of his neighbor, he is not thereby liable to any action for the diversion or stoppage of such water." Washburn's Easements and Servitudes, 441.

To elaborate the reasons for this rule, would be but to re-state

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that has been often well defined in numerous decided cases; but the sum of all is, that such water is not, and cannot be, distinguished from the estate itself, and of that the proprietor has the sole and absolute use, so that he does not directly invade that of his neighbor, or, consequently, injure his perceptible and clearly defined rights. For a full discussion of the subject, see Wash. 10, 448, and for a review of the authorities, *Trustees of the Village of Delhi v. Youmans*, 50 Barb. 316. The case at bar comes early within the general rule quoted. Therefore the judgment and order of the district court were correct.

They are affirmed.

A petition for rehearing having been granted, the following opinion was filed at the April Term, 1872.

By the Court, WHITMAN, J.:

A careful review of this case, upon rehearing, does not incline us to alter the original statement of facts; the conclusion therefrom is admitted to be correct. The evidence, as we read it, does not tend to show that there was any visible, open, running stream, in a well-defined channel, which had been interfered with. That the digging of respondents' wells cut off the underground springs and waters, percolating through the channel of a loose gravel stratum, is probably the fact; but such state of case is no stronger than the facts of *Ston v. Blundell*, 12 Exch. 324, or *Chasemore v. Richards*, 1 L. Ca. 349, ruling cases in England, which are sustained by the weight of American authority. *Trustees, &c., of the Village of Delhi v. Youmans*, 50 Barb. 316.

The word percolate was used in the original opinion, as it seems to be used in the decided cases, perhaps not with strict correctness in its definition, to designate any flowage of sub-surface water, other than that of a running stream, open, visible, clearly to be traced. The judgment of the district court is affirmed.

GARBER, J., having been of counsel in the court below, did not participate in the foregoing decisions.

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JOHN DOUGHERTY, RESPONDENT, v. WELLS, FARGO
& CO., APPELLANT.

GROUND FOR NON-SUIT MUST BE SPECIFICALLY STATED. Where a motion ~~for~~ non-suit was made in the district court upon a certain specified ground, ~~and~~ properly denied, so far as that ground was concerned: *Held*, that the motion ~~on~~ could not be sustained in the Supreme Court upon a ground not suggested in the court below.

ACTION FOR MONEY HAD AND RECEIVED—GROUND OF NON-SUIT WAIVED IF NOT URGED AT PROPER TIME. Where, in an action against Wells, Fargo & Co., for money had and received, the testimony introduced by plaintiff showed ~~that~~ he had delivered to defendant's agent a certificate of deposit, with instructions to renew it, but instead of doing so the agent had procured it to be cashed, and appropriated the money to his own use; and defendant moved for a non-suit on the ground that the action "could not be maintained for the loss of a certificate of deposit," which was denied: *Held*, on appeal, that though a motion for non-suit might have been sustained on the ground that the action for money had and received would not lie for malfeasance of defendant's agent; yet, no such ground having been taken, and a liability of defendant having been established, (though not upon contract as alleged) the judgment for plaintiff should not be disturbed.

ADMISSION OF OBJECTIONABLE EVIDENCE THAT COULD NOT PREJUDICE. Where, on appeal from a judgment for the recovery of money, the admission of ~~parol~~ proof of the contents of a certificate of deposit was assigned as error; and it appeared that it was unnecessary for plaintiff to rely upon or prove the contents of the certificate, and that the admission of the evidence could therefore not prejudice defendant; *Held*, no such error as would justify a reversal of the judgment.

NO PRESUMPTION OF RECEPTION BY PRINCIPAL OF MONEY FRAUDULENTLY OBTAINED BY AGENT. There is no presumption of law that a principal receives money, which his agent obtains by a wrongful act of his own in no wise authorized or sanctioned by the principal.

UNAUTHORIZED ACTS OF AGENT NOT DONE AS AGENT. No one can be the agent of another in the doing of an act which is in no wise authorized by, or which may be done against the expressed wish of, the principal.

WHEN PRINCIPAL LIABLE FOR UNAUTHORIZED ACTS OF AGENT. Where, in an action against Wells, Fargo & Co., it appeared that plaintiff delivered an old certificate of deposit to the agent of the company, for the purpose of having it sent to San Francisco to be renewed; and the agent fraudulently procured it to be cashed, and appropriated the money to his own use: *Held*, that Wells, Fargo & Co. were liable, not upon the rule that the agent acted for his principal in that particular transaction, but because he was employed by the company in that character of business, and held out by it as a person authorized and fully to be trusted.

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from the District Court of the Eighth Judicial District,
County.

rs that the plaintiff, in 1865, held a certificate of deposit
, issued to him by Wells, Fargo & Co., at San Francisco,

In 1869, he delivered it to J. W. Sweeney, Wells,
Co.'s agent at Shermantown, in White Pine County, with
to forward it by express to San Francisco, there to be
and the renewed certificate to be returned to him at
wn, at the same time paying the charges. The agent,
renewing the certificate, obtained the money on it, and
ned either certificate or money. This action was com-

February 14th, 1871. There was a verdict and judg-
aintiff. A motion for a new trial having been overruled,
appealed.

Wren, for Appellant.

e is a fatal variance between the complaint and the proof.
e defendant moved for a non-suit, plaintiff was apprized
ance, and should have asked leave to amend his plead-
ing to do so, the court should have granted the non-suit.

court erred in admitting the evidence in relation to the
the certificate of deposit—the evidence shows that the
been paid upon the certificate. Having been paid by
go & Co. at San Francisco, the presumption was that it
ession of that company; and proof of its contents was not
until after notice to the company to produce the original,
re upon its part to do so.

e court erred in refusing the instruction asked by de-

& *Darrow*, for Respondent.

tiff can maintain this suit upon the “common count for
and received.” Defendant’s counsel argued that the
ld have been trover to recover the certificate of deposit
e. But what difference could it make to defendant
e action was in trover or for money had and received?

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Cannot plaintiff in all cases like this waive the tort and bring his action in assumpsit for money had and received? The action for money had and received is liberal and equitable in its character, and will be sustained in every case where it appears that in justice and equity defendant has received money of plaintiff, or money that plaintiff is entitled to, and which in equity and conscience defendant has no right to retain. 1 Selwyn Nisi Prius, 81; *Krutz v. Livingston*, 15 Cal. 347; *Eddy v. Smith*, 13 Wend. 490; *Mason v. Waite*, 17 Mass. 562; 6 Black, 318; 2 Ind. 292; 8 Ind. 254; 17 Johns. 132; 11 Johns. 468; 3 Sneed, (Tenn.) 454; 5 Black, 14; 27 Barb. 655; 5 Pick. 281; 1 Hill, 296; 5 Hill, 580; 12 Cal. 90; 13 Wend. 154; 37 Barb. 291; 2 Scam. 318; 12 Pick. 124.

II. It is a well settled rule of law (applicable to this case) that if one of two innocent persons must suffer loss by the act of a third, he who put it in the power of the third person to do such act should in a court of justice be compelled to sustain the loss occasioned by its commission.

III. If the certificate had not been converted into money, the defendant could and should (if in its possession) have produced it. And if it had been paid, what difference would it have been to the defendant whether the certificate was produced or not?

IV. The instruction as worded was calculated to mislead the jury. If the lawfully authorized agent of defendant had received the money, plaintiff could recover without any proof that the agent had passed the money over to the corporation. To this extent the instruction was erroneous. In contemplation of law, the money collected by the agent would be in the possession of defendant, and in that sense the instruction would be correct. But it was evidently so worded as to convey the other idea, and was, therefore, properly refused.

By the Court, LEWIS, C. J.:

The first assignment of error in this case is founded upon the refusal of the court to non-suit the plaintiff, a motion to that end having been made "upon the ground that an action instituted for

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y had and received would and could not be maintained for the
f a certificate of deposit." This was the only ground sug-
d in support of the motion. But the proof did not show, or
to show the loss of the certificate. It was by no one claimed
t had been lost, but only that the agent of the defendant had,
lation of his duty, procured it to be paid and appropriated the
y to his own use; and thus the action was brought, not for
ss of the certificate, but rather for the money illegally appro-
d by the defendants' agent. As there was no intimation in
roof that the instrument had been lost, the non-suit would not
been warranted upon the ground upon which it was claimed;
s it was denied by the judge below, the appellant cannot be
tted to sustain his motion in this court upon a ground not
suggested. *Sharon v. Minnock*, 6 Nev. 377. Had the
n been made upon the ground that an action for money had
eceived could not be sustained, or would not lie for the mal-
ice or tortious act of the agent, the motion might, perhaps,
been sustained. (But this was not suggested.) The liability
o defendant was, however, clearly proven, although not upon
round of money that had been received by it for or from the
lant, as alleged in the complaint; but upon the ground that it
le in a proper action for the malfeasance of its agents when
within the general scope of their authority, as we will show
ter. Thus, as a liability was established, although not upon
ct, as alleged in the complaint, the verdict for the plaintiff
t now be disturbed upon a ground not suggested at the time
advantage should have been taken of it, if at all.

o second assignment of error is, that the parol proof of the
its of the certificate should not have been received. If it
admitted that such evidence were improperly admitted, still
case it cannot be held such error as will justify a reversal of
rdict, because it is quite manifest the defendant was not prej-
l by it. It was entirely unnecessary for the plaintiff to in-
e evidence as to the contents of the certificate of deposit, for
admitted by the agent of defendant, that he had received one
nd dollars on the instrument given to him by the plaintiff,
hat he had appropriated it. This was sufficient without any

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proof whatever of the character or contents of the paper delivered to the agent. The certificate belonged to the plaintiff, and the agent received a thousand dollars upon it: of this there is no dispute whatever. What mattered it then what might be the contents of the paper? None in the world. What money was received for or upon it belonged to the plaintiff, whatever sum that might have been, or whatever might have been the character of the paper; hence any proof as to its contents was utterly unnecessary, and could not therefore have prejudiced the defendant. The testimony that the agent had admitted the receipt of the money on the certificate was not objected to, and the record does not show that his statements in this respect were not of the *res gestae*, and therefore admissible and competent evidence. We must therefore presume that they were so.

The third assignment is that the court erred in refusing to give this instruction to the jury: "Unless you find that the defendant received the money sued for in this action, the plaintiff cannot recover." As matter of fact, it is not pretended that the money appropriated by its agent was ever received by the defendant. The evidence shows that the plaintiff had an old certificate of deposit issued by Wells, Fargo & Co., of San Francisco, which he wished to get renewed, and delivered it to the defendant's agent for the purpose of having it sent to San Francisco for renewal, paying the proper charges for its transmission. The agent, however, instead of getting the certificate renewed, fraudulently procured it to be cashed, and appropriated the money to his own purposes. Now it is not pretended that under such state of facts the defendant really received the money in question; but it appears to be claimed that in contemplation of law it did, because it came to the hands of its agent in the course of his employment. Upon this theory only can it be claimed that the money was ever received by the defendant, and upon this only can it be claimed that the instruction was correct in this particular case, as it is not pretended that the defendant actually received the money. But it is not a presumption of law that the principal receives money which his agent obtains by a wrongful act of his own, in no wise authorized or sanctioned. It is true, the principal is liable to third persons in

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case, but it is not because the agent acts for him in such transaction, or that he has received any benefit from the unauthorized act, or, as in this case, that he has received the money; for in many cases, where the agent does an unauthorized act, as was the case here, the principal receives no benefit; nor can the law presume that he does, when the act of his agent is or may be in direct opposition to his wishes. In the particular act so done he is not the agent of the principal, for no one can be the agent of another in the doing of an act which is in no wise authorized by, and which may indeed have been done against, his expressed wish. It is not upon this ground that the principal is held liable for unauthorized acts done by an agent within the general scope of his authority. That he may be held in such case is undoubted. Story says: "In the next place, as to the liability of the principal, third persons, for the malfeasances, negligences, and torts of his agent. It is a general doctrine of law that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit, for the acts or misdeeds of his agent; unless, indeed, he has authorized or coöperated in those acts or misdeeds; yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them." Story on Agency, § 452.

The liability, however, in such case arises not upon the rule that the agent acted for the principal in that particular transaction, but because he is employed by the principal in that character of business, and is so held out as a person authorized and fully to be trusted therein. When the agent in such case does an act which is apparently within the general scope of his authority, although not so in fact, if the principal were not held liable for the act, a third person, who had reason to believe that the agent was reliable, and possessed authority in the particular matter from the general character of his employment, might suffer loss; hence the law holds the principal liable upon the ground that he, rather than a third

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person equally innocent, should suffer. *Clark v. The Metropolitan Bank*, 3 Duer, 248, where it is said: "It is undoubtedly true that in many cases a principal is responsible for the act of his agent, which, although an abuse or excess of the authority of the agent, was within the general scope of the business he was employed to transact; but it is only true between the principal and a third person who, believing and having a right to believe that an agent was acting within, and not exceeding or abusing his authority, would sustain a loss, if the act were not considered as that of the principal. It is only true where the sole question is, by which of two innocent parties a loss resulting from the fraud or misconduct of an agent ought to be borne?"

If the principal is held liable upon this ground rather than upon the ground that the agent was acting for him in the particular unauthorized act, (which is certainly the true reason) then it follows the instruction asked and refused was not correct as applied to the facts of the case; for the defendant might be held liable, although it neither in fact nor in law received the money illegally appropriated by its agent. It was for this reason properly refused.

Judgment and the order denying a new trial are affirmed. It is so ordered.

THE STATE OF NEVADA, RESPONDENT, v. JAMES D. KENNEDY, APPELLANT.

CRIMINAL LAW — CHARGE ASSUMING PROOF OF MATERIAL FACTS. Where in a murder case the court instructed the jury that, "In order to make a killing under such circumstances as has been proven justifiable homicide, it must appear that the party killing had retreated as far as he safely could at the time, and in good faith declined all further contest, and was compelled to kill his adversary in order to save himself from death or great bodily harm, which to a reasonable man would appear imminent": *Held*, that this was substantially saying to the jury that defendant was guilty either of murder or manslaughter, provided they were satisfied he did not retreat to the wall before he killed deceased — thus assuming the proof of all the other material and essential facts — and was clearly error.

JUSTIFIABLE HOMICIDE — RETREAT NOT NECESSARY AFTER THREATS AND HOSTILE DEMONSTRATIONS. Where on a murder trial it appeared that deceased had beaten defendant in a brutal manner, and when compelled by third persons to

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desist, had in the hearing of defendant asked for a pistol, and said he would shoot him on sight; and that when they next met, deceased, without being assailed rushed at defendant with hostile demonstrations: *Held*, that if the demonstrations were such as to justify the belief that the deceased intended to carry out his threat, defendant would be justified in killing him without retreating.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The defendant was indicted for the murder of John Keeland, aged to have been committed on February 15th, 1871, at the town of Pioche. He was convicted of the crime of murder in the second degree, and sentenced to imprisonment at hard labor in the state prison for the term of fifteen years. A motion for new trial having been overruled, he took this appeal.

Ellis & King, for Appellant.

The instruction given by the court to the jury was error. It assumed the killing of deceased by defendant, which was in issue. It assumed the proof, or establishment in evidence, of the circumstances of the case. It assumed the conclusive establishment, by the evidence, of such a state of facts that, without the establishment of a certain stated explanatory state of facts, the jury could not find a less offense than murder. It was calculated to mislead the jury, inasmuch as it amounted to saying that the circumstances proven, in the opinion of the court, required a verdict of murder, unless the jury considered certain other and modifying circumstances as proven, in which case the verdict might be justifiable homicide or acquittal; shutting out consideration of the lesser offense of manslaughter. See also *State v. McGinnis*, 5 Nev. 17; *State v. Anderson*, 4 Nev. 265; *Caldwell v. Center*, 30 Id. 539; *People v. Williams*, 17 Cal. 142; *State v. Duffy*, 6 Nev. 138.

L. A. Buckner, Attorney-General, for Respondent.

The instruction objected to as erroneous, if read alone, would seem to be amenable to the objection; but when taken in connection with the fourth instruction, the objection vanishes. It is there said: "If it

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has been proven to the satisfaction of the jury that a man has been killed, and that man has been proven to be the one which it is charged in the indictment that the defendant killed, it matters not, provided the jury believe the defendant did the killing, whether it was proven that 'Jack Keeland' or John Keeland was killed." The charge of the court must be taken as a unit.

By the Court, LEWIS, C. J.:

The jury in this case were instructed that, "In order to make a killing, *under such circumstances as have been proven*, justifiable homicide, it must appear that the party killing had retreated as far as he safely could at the time, and in good faith declined all further contest; and was compelled to kill his adversary in order to save himself from death or great bodily harm, which to a reasonable man would appear imminent." This instruction clearly assumes the proof of material facts, leaving but one question to be determined by the jury, namely: whether the defendant had retreated as far as he safely could, before he killed the deceased. The "circumstances proven," as it is stated by the court, rendered him clearly guilty of a crime, provided the jury did not find the one fact—that he retreated as far as he safely could—in his favor. This was substantially saying to the jury that the defendant was guilty, either of murder or manslaughter, provided they were satisfied he did not retreat to the wall before he killed the deceased, thus assuming the proof of all the other material and essential facts.

The evidence shows that, a short time before the killing, the deceased had beaten the defendant in a brutal manner, and when compelled to desist by the interference of third parties, asked, in the hearing of the defendant, for a pistol; and said that he would shoot him, the defendant, "on sight." There is also some slight evidence that, ten or fifteen minutes afterwards, when the parties met, the deceased rushed at the defendant in a hostile manner, when the scuffle which resulted in the death of deceased occurred. If it be true that the threat was made by the deceased to kill defendant the first time he saw him, and when they next met he rushed at him with hostile demonstrations, the defendant (if not the assail-

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ould not be compelled to retreat, but if the demonstrations
 ch as to justify the belief that the deceased intended to carry
 threat, the defendant would be justified in killing him with-
 eating. Roscoe's Crim. Evidence, 765. But this instruc-
 ores all these circumstances of the case, and assumes that
 as no ground of justification to the defendant except that of
 retreated as far as he safely could.
 ment reversed.

STATE OF NEVADA, RESPONDENT, v. DANIEL E.
 HARKIN, APPELLANT.

LAW — CHARGING MATTER OF FACT. In a murder case, where it ap-
 ed that defendant had kicked deceased in the face, but the prosecution
 ended that the killing was by a kick upon the breast, and offered testi-
 y to show bruises there; and the judge, in overruling objections to such
 mony, remarked, in the hearing of the jury, "that there was as much
 mony that defendent had kicked deceased upon the chest as upon the
 ": *Held*, error, as charging in respect to mattter of fact.

ON OF JUDGE'S OPINION AS TO FACTS IN RULINGS AS TO EVIDENCE. The
 ion of a judge in respect to a matter of fact in a criminal case can be as
 tively conveyed to the jury by expressing it in their hearing while ruling
 an objection to evidence, as by embodying it in an instruction to them;
 he has no more right to volunteer such an opinion in one case than in the
 r.

TO CURE ERRONEOUS EXPRESSION OF OPINION AS TO FACTS. Where a
 e in the course of a murder trial, in overruling an objection to testimony
 ing to show that defendant had kicked deceased fatally in the breast,
 rked, "that there was as much testimony that defendant had kicked
 ased upon the chest as upon the face," and afterward took occasion to
 to the jury that in making the remark he was simply ruling upon an
 ction to testimony, and addressing himself more directly to counsel, and
 he did not wish to be understood as saying how much or how little testi-
 y there was upon any particular point, and that the whole matter was for
 to pass upon: *Held*, that the error of the remark, if curable at all, was
 ured by the caution—there being no retraction of his opinion, but merely
 claimer of opinion as to the absolute weight of such testimony.

IF INADVERTENCE AS FATAL AS WILLFUL ONES. If a judge in the course
 criminal trial expresses in the hearing of the jury his opinion as to a
 er of fact, the injury to defendant demands redress as imperatively in the
 of a mere inadvertence on his part as in case of a willful evasion of the

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INDICTMENT FOR MURDER — DEMURRER — SURPLUSAGE. Where an indictment for murder, in other respects sufficient, charged that defendant “feloniously, willfully and with malice aforethought, *to kill William Hardwick*, did with his hands and feet strike, beat and kick,” &c., going on to charge the infliction thereby of mortal wounds upon deceased, from which he died; and a demurrer was interposed on the ground that the facts stated did not constitute an offense known to the statute: *Held*, properly overruled, for the reason that the words “to kill William Hardwick” might be rejected as surplusage, and an indictment for murder, good on general demurrer, would still remain.

INDICTMENT CHARGING MURDER ARGUMENTATIVELY AIDED ON GENERAL DEMURRER. Where in an indictment for murder, otherwise sufficient, it was substantially charged that defendant with malice aforethought struck deceased, thereby giving him a mortal wound, of which he died; and it was objected on general demurrer that the killing was not charged in positive and direct terms, but only argumentatively: *Held*, that though such an indictment might be held defective on special objection, it was aided on general demurrer.

APPROVED FORMS OF INDICTMENT SHOULD BE ADHERED TO. Though indictments in unusual language may be held sufficient, nothing is gained by a departure from approved precedents and forms.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The difficulty, which resulted in the killing of deceased, occurred in a place known as the Snug Saloon, in Genoa, Douglas County. Several persons were present, besides deceased and defendant. Hardwick was under the influence of liquor. After some conversation with Harkin about twenty dollars which Hardwick owed Harkin, Hardwick referred to threats that he said Harkin had made against him. Harkin denied making any threats. The two men, together with a third person present, then drank together at Hardwick's expense. Soon afterward Hardwick turned to Harkin, and insisted that Harkin had threatened him, and that he, Hardwick, was a poor [using a coarse phrase], and had just as lief die there as at that place, and spoke about going out and fighting. Upon this Harkin struck Hardwick and knocked him down, and then jumped up on him and kicked him several times. Hardwick lay bleeding and insensible for some time, and died four or five days afterward.

Defendant, being convicted of murder in the second degree

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was sentenced to the State prison for twenty-five years. A motion for new trial having been overruled, this appeal was taken.

Ellis & King and *Thomas Wells*, for Appellant.

I. The indictment does not precisely and with certainty charge defendant with killing Wm. Hardwick. It only charges such killing, if at all, by argument, or by inference, or by conclusion of law. See *Blackstone*, 306, 307, 310 and 376. It nowhere directly and certainly charges that defendant *killed* or *wounded* the deceased. It is claimed that "to kill" is used, and that this, in connection with what follows, is equivalent to charging that defendant killed deceased. We think not. It may be inferred from the language used that defendant killed deceased, but in neither is it directly or with certainty charged that he did kill him.

II. The judge had no right to make the statement that there was as much evidence that defendant kicked deceased on the chest as on the face. It was without warrant of law or fact. It was without his province as judge. It was as much calculated to impress and influence the minds of the jury, as if he had said "your objection to the evidence of and concerning the autopsy to be given by the medical witnesses is not good, and is overruled because there is positive evidence that defendant *did kick* Hardwick on the breast." 3 Gr. & Wat. 1371; *State v. Ah Tong*, ante, 148. It matters not *when*, during the progress of a trial, a court invades the province of the jury, by charging as to evidence; or by saying *my* thing calculated to impress or influence their minds, or shape their conclusions as to what has been proven; or as to what degree of credence is to be given to any particular part of the testimony; or to the evidence upon any given point or fact in the case. See also, 4 Winston, 47; 3 Jones, (Law) 6; 14 Wis. 427; 27 Cal. 513; 16 Cal. 98; Const. Nev. Art. VI, Sec. 12.

III. Defendant asked the court (not in the presence of the jury) to remedy the wrong. The record shows what the court did in response. It made "bad, worse." Defendant tried again to have the injustice (not willful, we are sure) repaired, by asking certain instructions, which were refused; and again by a motion for a new

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trial, which was denied. In intendment of law, and in justice to the defendant, the utterance complained of should be treated the same as an instruction to the jury. See 1 Gr. & Wat. on New Trials, 310 *et seq.*; 12 Johns. 513; 3 Wend. 102; 12 Mass. 22; 11 Pick. 140, 162 and 368; 6 Cow. 682; 17 Cal. 142.

J. W. Healy, for Respondent.

I. The indictment was sufficient, because it complied fully and substantially with the requirements of the statute in "containing the title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties; a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended." Crim. Prac. Act, Secs. from 233 to 246; *State v. Anderson*, 3 Nev. 255; *People v. Stevenson*, 9 Cal. 273; 9 Cal. 576; 10 Cal. 313; 27 Cal. 507; 34 Cal. 191, 211.

II. The remark of the judge "that there was as much testimony that defendant had kicked deceased upon the chest as upon the face" should not be considered fatal, or even sufficient ground for a new trial, when upon suggestion of counsel for defendant the court fully corrected the error and closed the correction by saying: "The whole matter is for the jury to pass upon, and they will observe for themselves what the testimony is." *People v. Henderson*, 28 Cal. 465; *People v. Moore*, 8 Cal. 90; *People v. Garcia*, 25 Cal. 531. The court by its remark was only giving a reason for its ruling upon the admission of evidence in relation to bruises on the chest, and it may be fairly interpreted to have been only a statement of the evidence. The judge "may state the testimony and declare the law." Stats. 1861, 472. It was not possible to rule upon the question of the admissibility of the testimony regarding wounds on the breast of deceased, without allowing the jury to glean inferentially the opinion of the court upon the question of evidence as to blows upon the chest.

L. A. Buckner, Attorney-General, also for Respondent.

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By the Court, GARBER, J. :

The appellant was convicted of murder in the second degree, on an indictment accusing him of the crime of murder, committed as follows: "That said Daniel E. Harkin, of the county of Douglas, State of Nevada, on the ninth day of November, A. D. 1871, or thereabouts, at Genoa, county of Douglas, State of Nevada, without authority of law, feloniously, willfully, and with malice aforethought to kill William Hardwick, did, with his hands and feet, strike, beat and kick the said William Hardwick in and upon the head, neck, breast and body; then and there, by said beating, striking and kicking, giving unto said William Hardwick several mortal strokes, wounds and bruises, in and upon the head, neck, breast and body of him, said William Hardwick; from which said several mortal strokes, wounds and bruises, given as aforesaid by said Daniel E. Harkin, he, said William Hardwick, died, on the fourteenth day of November, A. D. 1871, at Genoa, in the county of Douglas, State of Nevada."

The defendant demurred, on the ground that the facts stated do not constitute a public offense, as known to our statutes. The demurrer was overruled. On the trial, the prosecution contended that the death resulted from a kick inflicted on the breast of deceased, and introduced testimony tending to show that the defendant knocked the deceased down and kicked him on the face, and also on the breast. The defendant contended that deceased was not kicked on the breast, and that the wound or bruise on the breast resulted from a fall, which, it was testified, happened the day before the affray. The testimony tending to establish the fact of the kicking on the face was much stronger and more positive than that going to show a kicking on the breast. The prosecution was allowed—and properly allowed—against the objection of the defendant, to prove by physicians that they detected signs of bruises or ecchymosis on the breast. The point of the objection was, that the state had not shown that any wound or bruise had been inflicted upon the breast of the deceased by the defendant. In overruling this objection, the judge remarked, in the presence and hearing of the jury, "that there was as much testimony that

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defendant had kicked deceased upon the chest, as upon the face." To the use of this language in the hearing of the jury, the defendant then objected. The record further shows, that "after all the testimony was in, and just before the commencement of the argument, the court remarked as follows: 'Upon suggestion of counsel for the defendant, and in order that, beyond any peradventure, the jury may have no misunderstanding as to the words or meaning of the court, when, in ruling upon an objection to certain testimony, the court said that there is as much testimony that the defendant kicked deceased upon the breast as upon the face, or used words to that effect, the court wishes to say that it was simply ruling upon the objection as it was made, and the question was as to the competency of the testimony objected to. The testimony was allowed, and the objection was overruled. This court does not wish to be understood as saying how much or how little testimony there is upon any particular point. The whole matter is for the jury to pass upon, and they will observe for themselves what the testimony is'; and that the above remarks were not delivered direct to the jury, as though the court were delivering an oral charge to them, but the court spoke and acted more directly to counsel for defendant, precisely as when making the ruling upon the point in which the alleged objectionable words were used.

"Nothing was then said further, and the argument then commenced."

Had the language objected to occurred in the written instructions given to the jury, the use of it would, beyond question, have constituted such manifest error as to entitle the defendant to a new trial. The wit of man could scarcely devise a more palpable violation of that provision of our organic and statute law, which prohibits judges from charging juries in respect to matters of fact. "The great object of this provision is to prevent the judge from interfering with the province of juries by any statement of his own judgment or conclusion upon matters of fact; to guard against any bias or undue influence which might be created in the minds of jurors, if the weight of the opinion of the court should be permitted to be thrown into the scale, in deciding upon issues of fact." 9 Allen, 279.

It is evident that the opinion of the court can be as effectively conveyed to the jury by expressing it in their hearing while ruling upon an objection to evidence, as by embodying it in what purports to be a declaration of the law for their instruction. Accordingly—and we think correctly—it has been held, that the judge has no more right to volunteer, before the jury, his opinion upon a material fact in controversy, while deciding a question of law on the trial, than he has to charge the jury in respect to such fact. 27 Cal. 319; 2 Winston, 47. The right to a decision on the facts, by a jury uninfluenced and unbiassed by the opinion of the judge, has been deemed worthy of a constitutional guarantee. It cannot be lawfully denied, by the simple evasion of looking at the counsel instead of at the jury, or of foisting the opinion into a ruling upon testimony.

The opinion here expressed was entirely uncalled for. It was not necessary, in order to explain the ruling, to say anything about the relative weight of the testimony. It was enough that there was testimony sufficient in law to authorize the jury to infer from it the fact that the deceased sustained the injury in question at the hands of the defendant. 6 Nev. 349–350. The necessity imposed upon the court of deciding the question of law whether there was any evidence from which the jury could draw a certain inference, afforded no pretext for the announcement of an opinion on the question of fact as to the weight of such evidence, as compared with other testimony in the case.

The error, if curable, was not cured by the remarks made at the close of the testimony. At best, they left the matter where it was before. There was no retraction of the opinion that the testimony tending to prove the two facts referred to was equiponderant; but merely a disclaimer of any opinion as to the absolute weight of such testimony. As we held in *State v. Ah Tong, ante*, the express statement that the whole matter was for the jury to pass upon was insufficient to obviate the effect of the opinion previously expressed.

Moreover, it is difficult to give to these remarks any pertinency whatever, without regarding them as an oral instruction to the jury; and, so considered, the fact that they were not reduced to writing

would constitute, of itself, ample ground for a reversal. *People v. Bonds*, 1 Nev. 33; *People v. Ah Tong*, 12 Cal. 346.

Of course, we impute no want of fairness or impartiality to the learned judge before whom this case was tried. Such inadvertence as this evidently was will sometimes occur in the hurry of a trial, with whatever purity and ability justice is administered. But when it does occur, the injury to the defendant demands redress as imperatively in the case of a mere inadvertence, as in case of a willful evasion of the law; and, we think, it is shown that to tolerate the former would necessarily result in giving free scope to the latter.

The demurrer to the indictment was properly overruled. Rejecting as surplusage the words "to kill William Hardwick," an indictment good on general demurrer remains. 17 Cal. 169. These words may be disregarded as though they were struck from the indictment. 1 Bishop's Crim. Prac., § 231. It will then charge all the elements of, or facts necessary to constitute the crime of murder as defined in our statute, viz: that at a time mentioned, at a place within the jurisdiction of the court, the defendant did unlawfully kill the deceased with malice aforethought. *People v. Cronin*, 34 Cal. 209; *Newcomb v. The State*, 37 Miss. 396; *State v. Verrill*, 54 Maine, 408. It is urged that the killing is not charged in positive and direct terms, but only argumentatively and by inference. We are inclined to think that if this objection had been distinctly specified in the demurrer, it should have been sustained. But, if the statement that A struck B, thereby giving him a mortal wound, of which he died, be only an argument that A killed B, it is certainly an infallible argument. The defectiveness, if any, of such a pleading is not in the matter pleaded, but in the manner of pleading it. The point of the objection is that the indictment is not direct—not that the facts stated do not constitute a public offense. Therefore, although not direct, but only argumentative, the indictment is aided on general demurrer. Stats. 1861, 465, Secs. 286-287; Gould's Pleadings, Ch. 3, Secs. 28-30.

Nothing is gained, however, by a departure from approved precedents and forms. In this case, for instance, days of labor spent in investigating and arguing the sufficiency of the indictment would

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have been saved by the insertion of the usual and formal allegation of an assault in lieu of the words italicized, and the addition of the phrase "and so the jurors aforesaid, etc., do say that the said Daniel E. Harkin him, the said William Hardwick, in manner and form aforesaid, feloniously, willfully, unlawfully and of his malice aforethought, did kill and murder, etc.,"—annexing (either expressly or by proper copulatives) the epithets unlawfully, with malice aforethought, etc., to every act set forth as a constituent of the offense. The judgment and the order refusing a new trial are reversed, and the cause remanded for a new trial.

By WHITMAN, J.:

I concur in the judgment upon the reasoning of Justice Garber. Upon the other point discussed, I express no opinion.

AMUEL B. FERGUSON, RESPONDENT, v. A. H. RUTHERFORD ET ALS., APPELLANTS.

REVIEW OF RIGHT OF PROPER CROSS-EXAMINATION ERROR. Where on the trial of an action of assumpsit for work and labor, in which defendant pleaded a general denial and a special contract which had not been complied with, plaintiff testified as a witness on his own behalf to a contract different from that claimed by defendant, and to the performance of the work and labor and its value; whereupon defendant claimed the right to show, by cross-examination of plaintiff, the existence and terms of the special contract as he claimed it, which was denied on the ground that it was not proper cross-examination: *Held*, error.

PRINCIPLE OF CROSS-EXAMINATION. A defendant cannot on cross-examination of plaintiff draw out proof of "new matter"; but he may properly elicit all such particular facts as can tend to disprove the essential or ultimate facts in the plaintiff's case, which the direct examination tended to prove.

"NEW MATTER" IN ACTION ON CONTRACT. As "new matter" is matter in confession and avoidance, such as cannot be introduced in evidence under an answer simply denying the allegations of the complaint, it follows that in an action on a contract it is not proving new matter for the defendant to show that there are other terms in the contract relied on besides those shown by plaintiff, whether such proof be calculated to defeat the action or only to reduce the damages.

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CROSS-EXAMINATION MAY BE THOROUGH, SEARCHING AND EXHAUSTIVE. So far as a party has a right to cross-examine, it is his privilege to make a thorough, searching and exhaustive examination.

RIGHT OF DEFENDANT ON CROSS-EXAMINATION OF PLAINTIFF. Where in an action on contract the plaintiff took the stand and testified to the existence and terms of the contract as claimed by him: *Held*, that the defendant had the right to draw out, on cross-examination and by leading questions, anything which would tend to contradict, weaken or modify the direct testimony of plaintiff, or any inference which might have resulted from it, tending in any degree to support his case.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The defendants in this action were A. H. Rutherford, George W. Rutherford and L. J. Hanchett. The facts are stated in the opinion.

Hawley & Darrow, for Appellants.

I. It was error for the court to refuse to allow defendants to cross-examine plaintiff upon the whole contract, the matters pertaining to the crushing and reduction of the ores, and as to all payments made therefor and for freight-money advanced. A cross-examination is about the only test, certainly the most efficacious one, which the law has yet devised to discover the truth. To deprive a party of this right is such irregularity and error as to prevent the party from having a fair and impartial trial, and is sufficient to reverse the case. 1 Greenl. Ev., § 446; 10 Mich. 460; 14 Cal. 23; 29 Ind. 456; 37 New York, 143; 47 Maine, 470; 8 Black, 556; 29 Ind. 293; 33 Cal. 647; 8 Gray, 172.

II. It is true, defendants might have made the plaintiff their own witness and then examined him. But a party ought not to be compelled to make his adversary's witness his own in order to explain a transaction about which the witness has testified in chief, when the object can be accomplished by a regular cross-examination conducted within proper limits. Such a rule if adopted would entirely destroy the object of a cross-examination, and deny to a party the right which the law allows of attacking the credibility of a witness or testing the accuracy of his memory, or disproving his

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statements, or of explaining the entire transaction. See *White v. Deickins*, 19 Geo. 285. Nor does it cure the error because some of the matters were partially inquired into afterward, and allowed without objection. See also *Cazenove v. Vaughan*, 1 Maule & Selw. 4; *Kissim v. Forrest*, 25 Wend. 651.

III. It was part of plaintiff's original case to prove the entire contract, and it was error to stop half way in chief and allow plaintiff the privilege of running over the whole track in rebuttal. 1 Greenl. Ev. § 74; *Leland v. Bennett*, 5 Hill, 289; *Valentine v. Mahoney*, 37 Cal. 398.

Ashley, Thornton & Kelly, for Respondent.

The questions were properly ruled out at the time, since they were intended by defendants to call out evidence to sustain the counter claim, and defendants could not introduce their special defence in cross-examination. Besides, the ruling out of these questions was immaterial, as the matters inquired about were fully examined into without objection, as shown by the questions and answers given.

By the Court, GABBER, J.:

The first count of the complaint in this case, if it states any cause of action, sets forth a general *indebitatus assumpsit* for work and labor performed for the defendants in crushing and amalgamating for them certain quartz ores. The answer attempts: first, to deny each allegation of the complaint; and second, to set up that the services were rendered under a special contract that the ores should be worked for twenty dollars per ton, the plaintiff guaranteeing to return to the defendants, in bullion, seventy-five per cent. of the pulp assay, and that such return had not been made.

On the trial, before a jury, the plaintiff testified on his own behalf as follows: "Between September 1st, 1870, and December 1st, 1870, I crushed, at my mill in Silver Park, for defendants and at their request, one hundred and sixty and a half tons of ore. I was to receive for the crushing and amalgamating twenty dollars, coin, per ton. I also paid freight on said ores in part. On the

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last two lots of ore I paid out for freight \$297.76 in coin, which has not been repaid me. This amount was paid at the request of Rutherford and Hanchett."

The defendants then attempted to cross-examine as follows:

Question 1. State whether there was a special contract made between you and the defendants for the crushing and working the ores you have referred to?

Question 2. Will you state whether the agreement to pay you \$20 per ton was the whole contract made between you and defendants with regard to crushing the ores, or whether it was only part of the contract?

Question 3. Did you not, at the time defendants agreed to pay you \$20 per ton for crushing said ores, agree with them, as part of the same contract, that you would guarantee to return to them 7 per cent. of the value of the pulp assay of all said ores?

Question 4. Did you say you were to have \$20 for crushing?
Ans. Yes.

Question 5. Was that all the agreement?

Ans. It was not.

Question 6. Was that the whole contract in regard to the crushing? Ans. I was to crush "No. 7" ore at 75 per cent. of the pulp assay in bullion. The contract was made with A. H. Rutherford, and was not to extend to the "M. F." or "No. 9" ore.

Question 7. Will you state the entire contract between you and Rutherford, in regard to the crushing of the ore for which this action was brought? State the whole contract, and when it was made, and by whom? Ans. I met A. H. Rutherford at Wheeler's store; he asked what per cent. I would work "No. 7" ore; I told him I would work 5 or 10 tons as a test at 75 per cent; I received no ore from him under this talk, and made no bargain. About August 20th, I met him in Hamilton; he was not satisfied about the return of some ore he had worked there; I told him I could work his "No. 7" ore to 75 per cent. if it worked as well as the ore I had worked for Church. "No. 9" and "M. F." ore were not in the agreement; the amount still due me from defendants is \$861.53 for crushing, and \$297.75 paid for hauling.

Question 8. Have you received to your own use, or retained out

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bullion produced by you from said ores, any of said bullion?
state the amount.

Question 9. Have you ever received any money from the defendant crushing the rock referred to? If so, when and how much?

Question 10. If you crushed in all 160 tons of ore, at \$20 per ton, is it that you only claim the sum of \$861.53 for said ore?
Why do you not claim the whole \$3,200?

Questions numbered 1, 2, 3, 8, 9 and 10, were objected to by the plaintiff, on the ground that they were introductory of the defendant's case. The objection was sustained and the questions were not allowed to be answered, to which ruling the defendants

The defendants then requested permission to examine the witness generally as to the existence and terms of said special contract and to show thereby that, according to its terms, the witness, if he complied therewith, had in his hands more than \$3,200 of said bullion to pay him the contract price, and that all the ores referred to in the complaint were included in the agreement, and that the plaintiff had kept all the accounts relating to the crushing of said bullion and assays. This was refused, and to the ruling the defendants excepted. There was no reëxamination, and the closing of this witness constituted the plaintiff's case in which thereupon he rested.

The defendants then introduced testimony in support of the case offered to make out by cross-examination, and the plaintiff, in reply, introduced testimony tending to sustain his theory that the crushing of the ore was embraced within or worked under the contract; and, further, that so much thereof as bound him to deliver 75 per cent. had been waived by mutual consent that no further work was done. The verdict was in favor of the plaintiff and he claimed, \$1,159 53.

The appellants assign for error the denial of the privilege of cross-examination as above set forth. The respondent contends:

First, that the rulings were correct, for the reason specified in his assignment; and second, that they were immaterial, because the questions inquired about were fully examined into without objection, and the answers above copied.

Under the first proposition, the result is the same, whether we

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apply to the facts of this case the English or the American rule. By the former, the defendants had the right to cross-examine the witness upon all matters material to the issue. See 2 Gray, (Mass.) 264; 24 Wis. 70. By the latter, they could not, on cross-examination, draw out proof of "new matter"; but might elicit all such particular facts as might tend to disprove the essential or ultimate facts in the plaintiff's case, which the direct examination tended to prove. 14 Cal. 24.

The plaintiff's case as he made it—that which the direct examination tended to establish—was, that a special contract between him and the defendants had been fully executed according to its terms, and that nothing remained to be done but the payment of the agreed price. 2 Wallace, 9; 14 Grattan, 453; 1 W. & Serg. 304; 2 Vroom, 336; 28 Ill. 378. The resultant facts which the proposed cross-examination tended to establish, went in direct denial of this case of the plaintiff. "New matter" is matter in confession and avoidance. Gould's Pl. Ch. 3, Sec. 195. It cannot be introduced under an answer simply denying the allegations of the complaint. But these facts did not constitute new matter. They qualify the contract relied on by the plaintiff, and introduce a new condition into it. A special plea, embodying such facts, is bad on special demurrer, as amounting to the general issue. *Nash v. Breeze*, 11 Mees. & W. 352; *Jones v. Nanney*, 1 Ib. 333. This is conclusive that they are not matters in confession and avoidance; for, even after the relaxation of practice which allowed many special defenses to be proved under the general issue, all facts confessing the truth of the declaration *might* be specially pleaded. Gould, Ch. 6, Sec. 56. Since the new rules in England, requiring all matters in confession and avoidance to be specially pleaded in every species of assumpsit, such a defense as that here set up is admissible under the general issue. Consequently, under our statute a denial of the allegations of the complaint is sufficient to let it in. See *Cousins v. Paddon*, C. M. & R. (Exch.) 556; *Pegg v. Stead*, 38 E. C. L. Rep. 373; 31 Ib. 562; *Moffett v. Sackett*, 18 N. Y. 527; 14 Cal. 414.

In order to recover the contract price, the burden was on the plaintiff to prove the contract and his performance of it. If, in-

stead of this, he had proved a fulfillment in good faith, but not in the manner prescribed, and the sanction and acceptance of the defendants, still the burden of producing and proving the contract would have rested on him. *Laduc v. Seymour*, 24 Wendell, 64, and cases *supra*. It follows that it is not proving new matter, for the defendants to show that there are other terms in the contract from which the plaintiff has deviated, either to defeat the action, or to reduce the damages, accordingly as the case of the plaintiff is shaped. Thus far, the defendants can go under their denials. The fact that circumstances called forth by legitimate cross-examination happen also to sustain a cross-action or counter claim, affords no reason why they should be excluded. 8 M. & W. 858.

In answer to the second proposition of counsel, but little need be said. So far as they had the right to cross-examine at all, it was the privilege of the defendants to make a thorough, searching and exhaustive examination. Admitting that it may be so needlessly and impertinently protracted as to justify the interposition of the court, this is a thing of rare occurrence; and, except in extreme cases, counsel should not be controlled or hampered in the exercise of a duty so delicate and important.

The facts here do not excuse the interference of the court, nor do they justify what was practically an absolute denial of the right. That right was, to draw out on cross-examination and by *leading* questions anything which would tend to contradict, weaken or modify the evidence the plaintiff had given on his direct examination, or any inference which might have resulted from it, tending in any degree to support his case—for instance, to show that his conduct had been at variance with his testimony or its tendency. 13 Gray, 283; 14 Mich. 184. Under this rule, some of the questions were obviously pertinent. The plaintiff might have so answered as to show that he claimed an amount inconsistent with his theory that he did not make the guarantee to the extent asserted by the defendants, and that to the extent that he did guarantee, this condition of the contract was waived. Until the questions asked were answered, neither the court nor the counsel could well determine the necessity or propriety of following them up with other questions; and, to have proffered others, in defiance of the distinct

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ruling of the court that no ~~cross-examination~~ as to the terms of agreement was proper, would have been unseemly and indecorous. The judgment and order appealed from are reversed.

THE STATE OF NEVADA EX REL. H. S. MASON, v. THE BOARD OF COUNTY COMMISSIONERS OF ORMSBY COUNTY.

POWER OF COUNTY COMMISSIONERS OVER SUPPLEMENTAL ASSESSMENTS. Under the act of 1867, (Stats. 1867, 111) the board of county commissioners are empowered to modify, equalize or discharge any supplemental assessments therein provided for, upon proper application of the party in interest.

CONSTRUCTION OF STATUTE RELATING TO SUPPLEMENTAL ASSESSMENTS. The language of the act of 1867, providing for supplemental assessments, (Stats. 1867, 111) does not limit the power of the board of county commissioners in reference to the modifying, equalizing or discharging of supplemental assessments; but is evidently intended to enlarge it in distinction to the restrictions imposed on the commissioners sitting as a board of equalization under the general revenue law.

SESSIONS AND TIME FOR EQUALIZING OR DISCHARGING SUPPLEMENTAL ASSESSMENTS. Under the statute relating to supplemental assessments, (Stats. 1867, 111) action may be taken by the board of county commissioners to modify, equalize or discharge such assessments, irrespective of the particular character of session of the board; nor is there any limitation imposed by the statute as to the time of application.

DISCHARGE OF SUPPLEMENTAL ASSESSMENT BY COUNTY COMMISSIONERS NOT UNCONSTITUTIONAL. The exercise of the functions of the board of county commissioners in the discharge of a supplemental assessment under the statute providing therefor (Stats. 1867, 111) is not obnoxious to the constitutional division of powers. (Const. Art. III.)

POWERS OF COUNTY COMMISSIONERS. The duties of county commissioners are various and manifold; sometimes judicial, and at others legislative and executive; in matters relating to the police and fiscal regulations of counties, they are such as may be enjoined by law, without any nice examination into the character of the powers conferred.

INTERPRETATION OF SECTION 26, ARTICLE IV, OF CONSTITUTION. The constitutional provision relating to county commissioners seems to have been adopted from California; and it may be lawfully presumed to have been taken with the judicial interpretation attached to it in that state.

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DISCHARGE OF SUPPLEMENTAL ASSESSMENT AFTER REFUSAL TO EQUALIZE. Where an application was made to the board of county commissioners to equalize a supplemental assessment under the act of 1867, (Stats. 1867, 111) which was denied; and afterward an application was made to discharge the same assessment: *Held*, that the board had not exhausted its power in reference to the assessment by its action on the application to equalize.

DISTINCTION BETWEEN "EQUALIZING" AND "DISCHARGING" AN ASSESSMENT. The discharge of a supplemental assessment under the act of 1867, (Stats. 1867, 111) is entirely different from an equalization of the same.

CERTIORARI—WEIGHT OF EVIDENCE NOT SUBJECT TO REVIEW. Where on certiorari from an order of county commissioners discharging a supplemental assessment, the record showed that the commissioners acted within their jurisdiction; and it was objected that the evidence was in conflict with the order: *Held*, that the question as to how they acted was not a subject of review on certiorari.

THIS was an original proceeding, on certiorari, in the Supreme Court. The affidavit set forth, among other things, that the county treasurer and ex-officio tax receiver of Ormsby County, in 1869, assessed the property of the Virginia and Truckee Railroad Company at \$161,000, under the provisions of the act of March 22th, 1867, (Stats. 1867, 111); that on January 11th, 1870, the company made an application to have the assessment equalized; that such application was denied; that on January 25th, 1870, a second application for equalization was made, upon which application the commissioners of their own motion struck out and remitted the entire assessment; that a writ of certiorari was issued by the Supreme Court to review such action of the commissioners, which upon review in the Supreme Court was reversed, [see *State ex rel. Swift v. Ormsby County Commissioners*, 6 Nev. 95]; that afterward, on July 7th, 1870, the company made an application to discharge the assessment; and in response thereto the board of commissioners made an order discharging the same. It was to review the proceedings on the application for discharge that this writ was issued.

L. A. Buckner, Attorney-General, and *Clark & Lyon*, for Respondent:

I. The commissioners had no jurisdiction to "equalize, modify or discharge the tax except at a general or special session," and not

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then unless within thirty days from the assessment. Stats. 1867, 111, Secs. 1 and 2.

II. The commissioners have no constitutional power to discharge a tax. This is purely a judicial question, with which the courts, not the commissioners, must deal. Const. Art. VI, Secs. 1 and 6; Cooley's Com. Law, 91 and 92; 33 Cal. 279.

III. The record fails to disclose the general facts conferring jurisdiction. There was no general or special meeting of the board to hear the complaint, such as is contemplated by law.

IV. The commissioners having once heard the complaint of the railroad company, and having finally acted thereon, exhausted their jurisdiction in the premises. *People v. Supervisors of Schenectady County*, 35 Barb. 408.

V. The evidence in the case is in direct conflict with the order of the board.

Mesick & Wood, for Defendants :

I. The commissioners had jurisdiction to discharge the assessment. The same statute which imposed the assessment conferred upon them authority to equalize, modify or discharge such assessment. Hence it may be said that the legislature authorized the assessment to be made only upon the condition that it might be so equalized, modified or discharged. It was as competent for the legislature to make this condition as to provide for the assessment at all; and it was likewise as competent for it to delegate the power of equalizing, modifying or discharging the assessment when made, as to exercise it itself.

II. The commissioners were invested with jurisdiction to enter upon the hearing of the matter of the petition, unless by reason of prior action the board had become *functus officio* in respect to this matter, or their jurisdiction was barred by lapse of time. Their jurisdiction was not barred by lapse of time so long as the matter stood as a mere assessment. No limitation is expressed in the act. Limitations are expressed in the general revenue law in respect of the period of jurisdiction of the board of equalization over other as-

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assessments. Hence, a different legislative intent in this case. To infer a limitation where none is expressed would be a violation of plain rules of construction, and lead to the accomplishment of the very injustice which the legislature, from the terms of the act, mainly intended to prevent.

As to any prior action of the board, there are two sufficient answers: one, that there is no sufficient evidence of any such prior action; the other, that the former action, if entitled to be considered, was not an application to discharge, but only to equalize. Discharging an assessment and equalizing an assessment are manifestly different and distinct acts.

III. The assessment complained of was subject matter for the jurisdiction of the board; but the quantity or quality of the means used to persuade their mind were not jurisdictional matters, and, therefore, they are not the subject of review here. On the testimony taken, they found that the property assessed was not property which the assessor has neglected or omitted from any cause to make an assessment of, nor property which had come into the county since the closing of the assessment roll. Whether these conclusions were correct or otherwise is not a question of jurisdiction at all, and cannot be, and therefore is not a question for review on certiorari. For aught that appears then, the board kept within the line of their jurisdiction, and, in discharging the assessment, made a valid order, which should be affirmed.

By the Court, WHITMAN, J.:

The Act of 1867, Stats. 1867, p. 111, providing for supplemental assessments, has been before considered. *Virginia and Truckee R. R. Co. v. Ormsby County Commissioners*, 5 Nev. 341; *The State of Nevada ex rel. Swift v. Ormsby County Commissioners*, 1 Nev. 95. From these cases it follows that the board of county commissioners was under that act empowered to modify, equalize or discharge any such assessment upon proper application of the party in interest.

Such application has been made in this case, and the assessment against the Virginia and Truckee Railroad Company discharged,

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which action plaintiff seeks to review and reverse on a writ of certiorari: contending, first, that such action could only properly be had at general or special session, and not then unless within thirty days from the assessment; that there is no showing as to the session, and that more than thirty days after assessment had elapsed before application made.

The language of the act does not limit the power of the board; but is evidently intended to enlarge it in distinction to the restrictions imposed on the commissioners sitting as a board of equalization under the general revenue law. It is said that upon application for relief, "the board of commissioners shall hold a general or special session, to hear and fully determine the matter. Stats. 1867, 111, Sec. 1. That is, action may be taken irrespective of the particular character of session. The record brought up shows that the board was in formal session when acting on the petition of the Virginia and Truckee Railroad Company, and that is sufficient. There is no limitation imposed by the statute as to the time of application for discharge; none should be inferred.

It is next objected that the discharge of a tax is a judicial act, and as such, beyond the powers of the board of commissioners. The plaintiff would have no right to this writ unless the board had such powers, because it is only granted "when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer." Stats. 1869, 263, Sec. 436. But the exercise of such functions is not, as plaintiff supposes, obnoxious to the constitutional division of powers. In 1857, the Supreme Court of California said, reversing the opinion in *People v. Hester*, 6 Cal. 679, which held that the writ of certiorari would not lie to review the action of county supervisors: "The error in the case of the *People v. Hester*, consisted in overlooking the fifth section of the ninth article of the constitution, which provides that 'the legislature shall have power to provide for the election of a board of supervisors in each county, and these supervisors shall jointly and individually perform such duties as may be prescribed by law.' This section must be regarded as limiting the third article (distributing powers). In using the word 'su-

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pervisors' the constitution intended to adopt it with its known meaning, and in the sense in which it was generally understood.

“The word ‘supervisors,’ when applied to county officers, has a legal signification. The duties of the officer are various and manifold ; sometimes judicial, and at others legislative and executive. From the necessity of the case, it would be impossible to reconcile them to any particular head ; and therefore, in matters relating to the police and fiscal regulations of counties, they are allowed to perform such duties as may be enjoined upon them by law, without any nice examination into the character of the powers conferred. This rule will preserve the utility of these officers, while it is, at the same time, in harmony with the spirit of the constitution itself.” *People v. El Dorado County*, 8 Cal. 58 ; *People v. Supervisors Marin County*, 10 Cal. 344 ; *Waugh v. Chauncy*, 13 Cal. 12 ; *Robinson v. Board of Supervisors Sacramento*, 16 Cal. 208.

Section 26 of Article IV, of the constitution of Nevada, seems to have been adopted from California, substituting the synonym “commissioner,” for “supervisor” ; so it may be lawfully presumed to have been taken with the judicial interpretation attached.

It is argued that the board had exhausted its power in the matter of the railroad application, because it had once acted upon the petition to equalize the same tax. If the legal proposition, that such a tribunal, having once acted, cannot review its action, be correct, yet the facts in this case do not furnish us with the necessary premise. The application first acted on was one to equalize ; the one under review is to discharge : two entirely different propositions. While, perhaps, the power to discharge might include the right to equalize, yet the authority to equalize would give no direct license to discharge. The ultimate object might possibly be attained, by equalizing to a minimum ; yet that would, if done in good faith, be an extreme case, and an evident exception to the rule. Through excess of caution, that no exception could be taken to the absolute control of the board upon application for action in these peculiar assessments, the legislature seems to have used the words “equalize,” “modify,” “discharge,” that every conceivable form of relief might be included ; so, notwithstanding the board had once acted upon a petition to equalize, it yet retained the power to

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act upon a subsequent application from the same party to discharge; that being another and entirely different matter. It will also be seen, that this is more a question of individual right in the petitioner, than of jurisdictional power in the board: such right must, by the received rules, be liberally construed; and cannot, therefore, be limited, as would be the case were the position of counsel sustained.

The objection that the evidence is in conflict with the order, cannot be considered. As the record shows affirmatively that the commissioners acted within their jurisdiction, how they acted is not the subject of review by this court. *Fall v. The County Commissioners of Humboldt Co.*, 6 Nev. 100.

The action of the board is affirmed.

By GARBER, J., dissenting:

I think the commissioners exhausted the jurisdiction conferred upon them by the statute, when they considered and denied the application to equalize. The grant of power to the commissioners must be strictly construed. 7 Ohio Stats. 115. And so construed, it seems to me that the legislature contemplated one application only by the person aggrieved. Upon such application, the commissioners are given the power, either to modify or wholly to discharge the assessment. By their refusal, on the first application, to modify it, they virtually affirmed its validity—they adjudged that the whole amount was properly assessed. And such their adjudication was, by the very terms of the statute, a final determination of the matter. Practically, too, this construction of the statute seems fair and just. It gives to the party aggrieved ample opportunity to show any cause he may have, why the assessment should be either totally set aside, if illegal, or reduced in amount, if excessive; and only denies to him the right to litigate his claim by piecemeal.

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JOHN S. MORRIS, APPELLANT, v. W. W. MCCOY, RESPONDENT.

LIQUIDATED DAMAGES WHEN HELD TO BE MERE "PENALTY." Where McCoy covenanted with Morris to pay certain debts owing by Morris, and, in case of failure, to pay to Morris \$10,000 as fixed, settled and liquidated damages: *Held*, that the sum so named was to be considered a penalty and not liquidated damages, and that in a suit on the covenant the recovery should be limited to the actual damage with legal interest.

RULE AS TO WHAT SHALL BE "PENALTY" INSTEAD OF "LIQUIDATED DAMAGES."

Where parties stipulate for the payment of a large sum of money as damages for the failure or nonpayment of a smaller sum at a given time, such large sum so agreed upon, no matter what may be the language of the parties, will be deemed a penalty and not liquidated damages.

COVENANT FOR PERFORMANCE OF VARIOUS ACTS—WHEN STIPULATED DAMAGES MERE PENALTY. Where a covenant is such that it secures the performance or omission of various acts, some of which may not be readily measurable by any exact pecuniary standard, together with others in respect of which the damages on the breach of the covenant are certain or readily ascertainable by a jury, any sum therein agreed upon as damages in case of breach will always be held a mere penalty.

COVENANT—WHEN CONSIDERATION STATED NOT TO BE VARIED BY PAROL. Where in a suit for damages under a bond, which called in terms for a large sum as "liquidated damages" but was in law a penalty to secure the payment of a smaller sum, and there was no ambiguity in the instrument: *Held*, that the agreement was fully embraced in the writing, and that plaintiff could not be allowed to show by parol that the consideration for the agreement was of greater value than the sum so secured to be paid.

COVENANT TO PAY "LIQUIDATED DAMAGES"—WHEN PAROL EVIDENCE CONCERNING "SITUATION OF PARTIES" ALLOWABLE. In a suit on a bond which provides for the performance of certain acts, and for the payment of a stipulated sum as damages in case of breach, parol evidence concerning the subject matter of the contract, so far as the situation of the parties is concerned, is only admissible when it tends to show that the failure to perform the acts agreed upon has resulted in such damages as cannot be readily ascertained by any pecuniary standard.

"OFFER OF PROOF" MUST SHOW WHAT PROOF IS OFFERED. Where, in a suit on a bond providing in terms for the payment of a large sum as liquidated damages, plaintiff offered to prove by parol "the situation of the parties and circumstances surrounding them," which offer was refused; and the bill of exceptions failed to show what particular situation or circumstances it was offered to prove, or whether they had any bearing on the contract: *Held*, that the offer was not sufficient, and was presumptively properly refused.

Morris v. McCoy.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

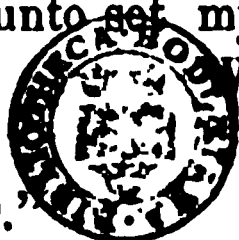
The bond sued on in this action was as follows : “ Whereas John W. Morris, William D. Morris and John S. Morris have this twenty-first day of July, 1869, conveyed to me, W. W. McCoy, by good and sufficient deed, all their right, title and interest in and to all the personal and real property known as the property of the Eureka Smelting and Mining Company, situated, lying and being in Eureka Mining District, Lander County, state of Nevada. Now, therefore, in consideration of said transfer and conveyance on the part of the said John W. Morris, William D. Morris, and John S. Morris, I do hereby covenant and agree to and with the said John S. Morris that I will pay and fully discharge all debts and obligations of whatever name or kind that may now be due and owing, or that may become due, from the said John S. Morris as a member of the firm of Morris, Monroe & Co., created in the management or working of the said Eureka Smelting and Mining Company's property, being the same this day conveyed to me by the said John W. Morris, William D. Morris and John S. Morris. And I do further covenant and agree to and with the said John S. Morris, that I will pay and fully discharge that certain promissory note made, executed and delivered in the year 1869, to one P. B. Poryjoy by the said John S. Morris, in the sum of about one hundred and eighty dollars. And I do further covenant and agree to and with the said John S. Morris that I will hold him harmless against all actions at law or in equity that may be brought against him individually, or as a member of the firm of Morris, Monroe & Co., for the recovery of any of the debts now due, or to become due, against the said John S. Morris as a member of the firm of Morris, Monroe & Co., made or created in the management or working of said property; and that I will pay all costs and other expenses that the said John S. Morris may be put to, or become liable for, in the defense of any action that may be brought for the enforcement of any debt or other obligation created in the management or working of said mining property. For the faithful performance of each and every of the covenants and agreements hereinbefore mentioned, I do bind my-

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self unto the said John S. Morris in the sum of ten thousand dollars gold coin of the United States, as fixed, settled and liquidated damages to be paid to the said John S. Morris, if I make default in the performance of any of the said covenants and agreements. In witness whereof, I have hereunto set my hand and seal, this twenty-first day of July, 1869.

“Witness: F. M. SMITH,

W. W. HOBART.”



W. W. MCCOY. [SEAL.]

The complaint alleged that defendant had made default in each of the covenants of the bond, and proceeded to set forth that plaintiff had been sued on one debt owing by him as a member of the firm of Morris, Monroe & Co., and compelled to pay thereon for damages, costs and attorney's fee the sum of \$283.13, and that he had paid another debt so owing by him of \$168. There was a prayer for \$10,000 damages. The answer denied fully the allegations of the complaint. There was a judgment for defendant, from which plaintiff appealed.

The statement on appeal contained a series of offers of evidence by the plaintiff, adverse rulings thereon, and exceptions. The chief offers were to prove by parol that McCoy fully and explicitly understood and intended that he was to pay the stipulated sum of \$10,000 as fixed, settled, and liquidated damages upon the breach by him of either of the conditions of the bond in the slightest particular, and expressly promised to do so without cavil or dispute; and also that the value of the consideration expressed in the bond was largely in excess of all the debts of Morris undertaken to be paid by McCoy.

After stating the above offers, their exclusion and exceptions, the statement on appeal proceeded to set forth that the Court below refused to allow any testimony at all in relation to the above matters offered, or in relation to the situation of Morris and McCoy at the time of the execution and delivery of the bond, or the circumstances by which they were surrounded, together with plaintiff's exceptions thereto; and that then plaintiff introduced in evidence the bond, and that there was no other evidence produced by either party.

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George S. Hupp, for Appellant.

I. It was competent for the parties to the bond in suit here to agree that, upon a breach by the obligor, the sum therein named should be considered and treated as liquidated damages, and not as a penalty. Sedgwick on Damages, 417-420; *Goldsworthy v. Strutt*, 1 Excheq. 659; *Crisdee v. Bolton*, 3 Car. & P. 240; 12 Barb. 147; 18 Barb. 338; 19 Barb. 109, 389; 25 Cal. 70 *et seq.*

II. The testimony offered by plaintiff was admissible. In action on an agreement for the payment of a certain sum if the promisor should not do a certain act, where the question is, whether such sum is a penal one or liquidated damages, parol evidence is admissible concerning the subject matter of the agreement, so far as respects the situation of the parties and the facts relating to the agreement, and especially to the consideration thereof. *Hoodges v. King*, 7 Met. 583; *Perkins v. Lyman*, 11 Mass. 81; *Thomas v. Truscott*, 53 Barb. 204; 1 Greenleaf on Ev. §§ 286, 7, 8.

When the purpose for which a writing was executed is not inconsistent with its terms, it may properly be proved by parol. *Hutchins v. Hibbard*, 34 N. Y. 26.

Hillhouse & Tilford, for Respondent.

I. So far as the testimony excluded tended to invalidate the bond sued upon, by showing that it was but a part of a system of fraud and oppression alleged to have been committed by the defendant on the plaintiff, it was clearly inadmissible. The plaintiff having introduced the instrument and made it a part of his case, claiming under its provisions \$10,000 as liquidated damages; and the defendant having denied and put in issue all the allegations of the complaint, it was certainly not competent for the plaintiff to tack the very instrument on which this action was founded. Evidence must be *pertinent* to the issue made by the pleadings.

II. If a covenant is for the performance of, or for the abstinence from some act or acts, and the damages resulting from a violation of the covenant can be ascertained and measured by an extrinsic standard, then the sum stipulated for the violation

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ovenant as damages is deemed a penalty, or in the nature of a penal sum, whatever may be the language of the instrument. If the instrument provide for the payment of a larger sum, on the failure of the obligor to pay a less sum, in the manner prescribed, the larger sum is always, whatever may be the language employed in the instrument, considered a penalty. *Kemble v. Farren*, 6 Bing. 141; 3 Car. & Payne, 240; Sedgwick on Dam. 411; *Merrill v. Merrill*, 15 Mass. 488; 11 Mass. 76; *Head v. Bowers*, 23 Pick. 455; 3 Johns. Cases, 297; 17 Wend. 447; 22 Wend. 201; 4 Wend. 246; 18 Johns. 219; 12 Barb. 367; 18 Barb. 50; 5 Sandf. 192; 19 Barb. 106.

III. A sum named as liquidated damages must be construed a penalty in all cases where the agreement contains various stipulations differing in importance, and it is to each and all of them that the damages apply. See note to Sedgwick on Dam. 410; 1 Ind. 34; 3 Ohio St. 241.

IV. If the construction contended for by plaintiff's counsel be correct, then for a failure to pay the sum of \$180, the amount of the promissory note specified in the second article, the defendant became liable to Morris for \$10,000. But the damages resulting from a violation of any of the covenants specified in the bond were easily ascertainable, and capable of being measured by an exact pecuniary standard. This brings the case within the letter and reason of the rules, adopted by the courts for the construction of instruments of this character, for determining whether the sum named to secure the performance of their covenants shall be treated as a penalty or as liquidated damages.

By the Court, LEWIS, C. J.:

Whether a sum of money agreed upon by the parties to a contract to be paid in case of a breach shall be held liquidated damages, and so literally enforced, or a penalty, in which case the actual damage resulting from the breach and not the amount stipulated is allowed to be recovered, has ever been a perplexing question to the courts. Although, as a general rule, it is acknowledged that the intention of the parties as expressed in the contract should

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be enforced, still it is clearly ignored in that class of cases where the parties stipulate for the payment of a large sum of money as damages for the failure or nonpayment of a smaller sum at a given time. In such cases it is said, no matter what may be the language of the parties, the large sum agreed upon will be deemed a penalty, and not liquidated damages.

In *Astley v. Weldon*, 2 Bos. & Pull. 346, Chambre, J., said that at "There is one case in which the sum agreed for must always be considered as a penalty; and that is, where the payment of a smaller sum is secured by a larger." And this language has been frequently quoted and adopted by the American courts as a correct exposition of the law. In *Kimball v. Farren*, 6 Bing. 141, Tindal, C. J., said: "That a very large sum should become immediately payable in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have in modern times endeavored to relieve, by directing juries to assess the real damages sustained by breach of agreement."

The Supreme Court of New Hampshire, in *Mead v. Wheeler*, 13 N. H. 353, after adopting the remarks of Chambre, J., *supra*, go on to say: "Although in fact a creditor may suffer the most serious injury from the want of punctual payment of his debt, and the payment of the principal and interest may very inadequately compensate him for his disappointment, still the payment of more than the legal interest cannot be enforced under the denomination of a penalty, although if the agreement to pay a penalty be in accordance with the general usage and practice of a particular trade, it has been held that it might be enforced, even if it should exceed the legal interest." The case of *Spear v. Smith*, 1 Denio, 464, was an action upon a submission to arbitration, providing that the arbitrators should determine what damages either party should pay to the other, and containing a clause that the party who should refuse to abide the award should pay to the other one hundred dollars "as the ascertained and liquidated damages." The arbitrators having awarded to the plaintiff \$10.40, it was held that the one

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hundred dollars was a penalty, and that only the ten dollars and forty cents could be recovered. 3 Leading Cases in Equity, note to *Peachy v. Duke of Somerset*, where it is said: "Whenever, therefore, the damages resulting from a breach of agreement are susceptible of being estimated by calculation, they cannot be liquidated by the parties themselves, who must be content to abide by the rule of compensation established by law." And it is said in *Viver v. Rossman*, 18 Barb. 55, "It may now be regarded as well settled that no damages can ever be so liquidated between the parties for the mere nonpayment of money, as to secure the payment of a greater sum than that named in the covenant, with interest." And Parsons states this to be the established rule. 3 Parsons on Contracts, 159; see also 5 Sanford; *Bagley v. Peddle*, 192; *Mason v. Flint*, 2 Minn. 350.

The reason given for the rule is, that the object of the contract is its fulfillment — that is, the doing of the thing, the performance of which is sought to be secured by the penalty or liquidated damages, and not the infliction of an injury on the one side, nor the acquisition of a collateral advantage on the other. Chancellor Kent, in *Skinner v. Dayton*, 2 Johns. Ch. 535, says: "The true foundation of relief is, that when penalties are designed to secure money or damages really incurred, if the party obtains his money or damages he gets all that he expected or required." Consequently, when the covenant or contract is broken, the intention of the parties is best carried out by substituting a compensation in damages, which the law fixes at the legal rate of interest. Now it is very evident in this case, that the chief object of the contract was the payment by McCoy of certain debts owing by Morris. Had he paid them, the object of the contract would have been accomplished, and it would have been executed in its very letter; and the plaintiff would have received all he expected to. But they were not paid, and for the failure to do so he claims the recovery of the ten thousand dollars stipulated as the damage in case of such failure. But by the rule of law suggested, the recovery must be limited to the actual damage, with legal interest. The case comes squarely within the rule that a large sum, stipulated to be paid in default of the payment of a smaller sum, must always be deemed a penalty, no matter what

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may be the language of the parties. There is another covenant in this case, it is true — that is, that the obligor McCoy will save the plaintiff harmless from all suits instituted for the recovery of the debts agreed to be paid. However, taking the whole agreement together, it is simply an agreement to pay certain debts of Morris. But should it be considered an independent covenant, and that the damage resulting from a breach of it would be uncertain, the plaintiff is in no better condition, for it is well settled that the sum agreed upon between the parties will always be held a penalty, where the agreement is such that it secures the performance or omission of various acts, some of which are not readily measurable by any exact pecuniary standard, together with others in respect of which damages on the breach of the covenant are certain, or readily ascertainable by a jury. Such was the case in *Kimball v. Farren*, 6 Bing. 141, *supra*, and is the rule uniformly adopted in this country. Leading Cases in Equity, note to *Peachy v. Duke of Somerset*.

Hence, if the covenant to save the plaintiff from suits for the recovery of the debts in question be a covenant, the breach of which could not be readily measured by any exact pecuniary standard, as it is united with one that is so—that is, the payment of the debts—and as the whole sum stipulated to be paid as damages is payable upon the breach of either covenant, the case comes within the rule of *Kimball v. Farren*; and if, on the other hand, it be a covenant, the damage for the breach of which can be so readily measured, then it comes within the first rule.

With this general statement of the law before us, we are prepared to inquire whether the assignment of error relied on in this case is tenable. We think not. It was proposed by counsel for appellant to show, by parol testimony, the agreement and understanding between the parties at the time the contract in question was executed. That was not admissible, because there was no ambiguity; and it must be supposed the agreement was fully embodied in the written instrument. 1 Greenleaf on Evidence, § 275. The evidence offered for the purpose of showing that the consideration for the agreement was in fact of greater value than the money to be paid by McCoy, certainly could not help the appellant, if the

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law be correctly stated in the authorities referred to. If it be a fact that in no case will the amount designated by the parties be held to be liquidated damages, when it is simply security for the payment of a lesser sum, then certainly it was of no consequence what may have been the consideration moving from Morris to McCoy ; for the contract is one of that character, and comes directly within the rule announced by Chambre, J., in *Astley v. Walden*. The evidence, then, offered for the purpose of showing the consideration, would not aid the plaintiff.

Any evidence tending to show that the failure to fulfill a contract will result in such damage or injury to a party that cannot be readily ascertained by any pecuniary standard, is undoubtedly admissible ; for such evidence goes to show it to be a case in which the parties have a right to fix the measure of damage. This is clearly what is meant by the cases holding that parol evidence is admissible concerning the subject matter of the contract, so far as the situation of the parties is concerned, in cases of this kind. This could not, however, possibly be the result here. But there is another answer to this point. It is stated only, in the bill of exceptions, that the plaintiff offered proof of the situation of the parties, and circumstances surrounding them. What particular situation or circumstances it was proposed to prove, does not appear. It was certainly necessary to show that the situation or circumstances offered to be proved had some bearing on the contract. This was not done—the specific offer of evidence which preceded this general offer was clearly only of evidence which could in no wise aid the plaintiff, or tend to show that the case does not come within the rule respecting an agreement to pay a greater sum upon failure to pay a less, or that the amount agreed upon between the parties should not be held to be a penalty.

The judgment below must be affirmed.

State v. Jones.

THE STATE OF NEVADA, RESPONDENT, v. R. B. JONES
AND JOHN NERY, APPELLANTS.

CRIMINAL LAW — SEPARATION OF JURY. Where, after the retirement of the jury in a criminal case, one of them left the jury room in company with the officer in charge, and visited his residence, about five hundred yards distant, and while passing through the street was spoken to by several persons; but there was no showing that anything was said in his hearing about the case, or that the officer had not been constantly at his side: *Held*, that as there was no evidence of any opportunity of tampering with the juror, there was no ground for setting aside the verdict.

SEPARATION OF JUROR IN CHARGE OF OFFICER — PRESUMPTION. Where a juror in a criminal case separated from his fellows, but was shown to have been in the charge of a proper officer: *Held*, that a presumption that he could have been tampered with during such separation was inadmissible.

CONDUCT OF JURY — DRINKING SPIRITUOUS LIQUOR. The mere drinking of spirituous liquor by a juror, when not furnished by the prevailing party, is not such irregularity or misconduct as will vitiate a verdict.

AMENDMENT VI OF U. S. CONSTITUTION NOT APPLICABLE TO STATE TRIBUNALS. The provision of Amendment VI of the United States Constitution, that accused persons are entitled to be confronted with the witnesses against them, is applicable only in the federal courts, and is in no wise a restriction upon the powers of the states, or applicable to state courts.

DEPOSITIONS IN CERTAIN CRIMINAL CASES. The statute providing for depositions, under certain circumstances, in criminal cases, (Stats. 1867, 125, Secs. 151 and 171) is not amenable to the objection of being opposed to the United States constitution.

OFFER OF DEPOSITIONS ON CRIMINAL TRIAL — PRELIMINARY PROOF. When a deposition in a criminal case is offered in evidence, the offer should be accompanied with proof that it was taken in conformity with the statute; and if the proper objection be made, it should not be admitted without such preliminary proof.

OBJECTION TO DEPOSITION IN CRIMINAL CASE — WHEN TOO GENERAL. Where a deposition in a criminal case was offered by the prosecution, and defendant objected that it was "incompetent evidence": *Held*, that such objection was too general to reach the point of failure to show that the deposition was taken in a case authorized by the statute.

OBJECTIONS SHOULD BE SPECIFIC AND POINTED. In criminal, as well as in civil cases, objections should be so specific that the attention of the court may be directed to the exact point, so that the objection may be obviated if it be of a character which admits of remedy.

INDICTMENT FOR GRAND LARCENY — ALLEGATION OF "WITHOUT AUTHORITY OF LAW." Where an indictment for grand larceny alleged that defendant "feloni-

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ously did steal, take and lead away" the property, &c.: *Held*, that it was sufficient that the essential facts constituting the grand larceny were charged, without a special allegation that such acts were "without authority of law," or any equivalent allegation.

CRIMINAL LAW — ORAL REMARKS OF JUDGE TO JURY — REQUEST TO AGREE.—

Where the judge, in a criminal trial, orally stated to the jury that, as the trial had occasioned great expense, and a large venire had been exhausted and much time taken up, and it was doubtful whether another jury could be procured, he would give an instruction upon the point on which they had been in doubt the night before, and it might aid them in making up a verdict; and he then read an instruction: *Held*, that the oral statement was in no sense a charge or instruction, and not open to objection for being oral; nor was it objectionable as calculated to encourage the jury to find an inconsiderate verdict.

TRIAL OF ACCESSORIES BEFORE THE FACT — CHARGE AS TO PRINCIPAL. Where, on a trial for grand larceny of horses, the evidence tended to show that they had been stolen either by Jackson or by Big Ben, and that defendants were accessories before the fact; and the court charged that, "The defendants might be found guilty, regardless of the guilt or innocence of Big Ben"; *Held*, it appearing that other portions of the charge clearly showed what constituted an accessory before the fact and what was necessary to justify his conviction, that the instruction was unobjectionable.

GRAND LARCENY — INSTRUCTION IGNORING THAT ACCESSORIES MAY BE GUILTY AS PRINCIPALS. Where instructions in a grand larceny case ignored the fact that defendant may have advised and counseled the felonious taking by a third person, and asked an acquittal unless it appeared that defendant personally took the property: *Held*, properly refused.

TRIAL OF ACCESSORY BEFORE THE FACT — PROOF OF GUILT OF PRINCIPAL NOT NECESSARY. Under our statute it is not essential to the conviction of accessories before the fact, that the prosecution first prove the guilt of the principal; it is only necessary in such case to show that a crime has been committed, and that defendant, if present, aided and assisted, or if not present, advised or encouraged it.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The defendants were indicted for the stealing on June 17th, 1871, of two horses from J. R. Cunningham, and one horse from James Barney, at Pioche City, in Lincoln County. It appears that they were arrested with the horses in their possession some fifteen miles from Pioche, and that they were at the time on their way towards Idaho, having started before daylight. They claimed to have purchased the animals from Charles Jackson, and a paper,

purporting to be a bill of sale, signed by a person of that name, to Jones, was offered in evidence. One "Mormon Ben" or "Big Ben" had been in their company previous to the arrest, but had ridden on ahead at the time of the arrest, and was not taken. The horses were stolen the previous night at a place called Dry Valley, near Pioche, and there was evidence showing that "Big Ben" had been there the evening before. There was evidence tending to show that defendants had freely talked at Pioche for several days before their departure of their intention of going to Idaho, but there was no testimony explaining who Charles Jackson was. One witness, who professed to be well acquainted in Dry Valley and the surrounding valleys, and who knew the horses and "Big Ben," said that he knew of no one by the name of Jackson in the county.

In the course of the trial, the prosecution showed that a subpoena had been issued for A. A. Dolliff, who had assisted in the arrest; that he could not be found; and that he was thought to be out of the state. His deposition, taken before a justice of the peace, was then offered and read in evidence against defendants' objection that it was not competent testimony.

The instructions asked by the defendants and refused by the court, as stated in the opinion, were as follows:

1. If the jury believe, from the evidence, that the defendant, R. B. Jones, obtained the horses mentioned in the indictment from some person in the town of Pioche, on the night of the alleged larceny, then the jury should find a verdict of not guilty.

2. That if they believe, from the evidence, that the defendants were in the town of Pioche at the time the horses were alleged to have been taken from the pasture in Dry Valley and brought to Pioche, and did not assist in taking them, then you must find a verdict of not guilty.

3. That a man cannot be guilty as an accessory unless there is a principal who is guilty, and the state must prove the guilt of the principal; for, in the nature of things, a man cannot be holden for procuring an act to be done, or for receiving the doer knowing of the act, unless it were in fact done, and also proven by competent testimony.

4. The court instructs the jury that the jury must decide this case upon the sworn testimony of witnesses who have been examined in their presence, and that the jury must find the defendants either guilty or innocent from the testimony so given ; and that outside circumstances, referring to the acts of third persons, and impressions that the jury may have as to the acts of a person other than the defendants, should not have any weight upon the jury. The defendants are on trial, charged with the commission of certain acts ; and if the jury believe, from the testimony, that some person besides the defendants committed the offense charged in the indictment, then the jury should render a verdict of not guilty.

5. That they are not to take into consideration the acts of "Morrison Ben," or any third person ; and that the defendants are liable for their own acts alone, and are not liable for the acts of any other person or persons, unless the testimony shows that such third party acted by direction of the defendants. Also, that it is a principle well settled in law, that, in cases of doubt, the jury should acquit the defendants, because it is better that ninety and nine guilty men should be acquitted than that one innocent man should be convicted. Unless the jury are satisfied, from the testimony, that the defendants are guilty, as charged in the indictment, and so proven guilty, beyond all reasonable doubt, the defendants are entitled to the benefit of the doubt, and the jury should acquit the defendants.

The defendants having been convicted, as charged, and a motion for new trial having been overruled, they were sentenced to imprisonment at hard labor in the state prison for five years.

Ellis & King, for Appellants.

I. The drinking of any spirituous liquor by the jury, however small the quantity, is of itself ground for a new trial, without inquiry into the abuse and injury worked in the particular instance. *People v. Douglas*, 4 Cow. 26 ; *Brant v. Fowler*, 7 Cow. 562 ; *Fregg v. McDaniel*, 4 Harrington, 367 ; *People v. Ransom*, 7 Wend. 417 ; *Ryan et al. v. Harron et al.*, 27 Iowa, 494 ; 1 American Reports, 302.

II. The admission of the deposition of Dolliff in evidence was

error prejudicial to defendants. They were entitled to be confronted with the witnesses against them. U. S. Const., VI Amendment.

III. The indictment does not charge the acts of the defendants to have been "without authority of law," or any equivalent allegation, as "unlawfully" or "unlawful." 1 Archibald's Criminal P. and P. 92, Note 1 and citations.

IV. The oral instruction or address of the judge to the jury was calculated to mislead them. It was framed to impress upon them that the avoidance of further time and trouble in the cause had become their chief duty and the only obligation resting upon them, thus, leading them away from the consideration of the issues and proofs in the case. This instruction, remarks or address, was error, because oral, and also as misleading the jury. *State v. Ah Tong*, ante, 148; *State v. McGinnis*, 5 Nev. 37; *State v. Duffy*, 6 Nev. 138.

V. The instruction concerning the guilt or innocence of "Big Ben" was error. It was a charge in respect to a fact. The charge is not "regardless of Ben's conviction," but regardless of a certain fact relating to him, upon which, in truth, defendants' guilt or innocence might entirely depend.

J. C. Foster and *W. W. Bishop*, also for Appellants.

L. A. Buckner, Attorney-General, for Respondent.

People v. Lee, 14 Cal. 510; *People v. White*, 34 Cal. 183; *People v. Martin*, 6 Cal. 477; *Williams v. Gregory*, 9 Cal. 76.

By the Court, LEWIS, C. J.:

The defendants were indicted, tried and convicted of grand larceny for the stealing of three horses. A motion for new trial was regularly made, denied and an appeal taken, upon which several errors are assigned; the first, being an illegal separation of a juror named Wilkin from his fellows, after the submission of the case. This assignment is founded upon an affidavit setting out substantially that the juror, in company with the officer placed in charge, left the jury room and visited his residence some five hundred yards from

the jury room ; that whilst passing through the streets several persons spoke to him ; but there is no showing whatever that anything was said in his hearing respecting the trial, nor that the officer in whose charge he appears to have been was not constantly at his side. There is, therefore, no evidence that there was an opportunity, or even a possibility of tampering with the juror, unless it can be presumed that it could be done whilst he was in the immediate presence of the officer ; a presumption totally inadmissible.

The rule upon this head is now well settled to be that the separation of the jury, even though unauthorized by the court, when there is no opportunity of abuse, is not a ground for setting aside the verdict. 2 Graham & Waterman on New Trials, 502. Here the affidavits on behalf of the prisoners warrant the conclusion that the juror was constantly attended by the sworn officer of the court. Under such circumstances, no case can be found holding that the separation is illegal. Indeed, it can hardly be said that there is a legal separation, where one juror in charge of an officer leaves the others, who are left either under lock and key, or under the immediate charge of another officer. The Supreme Court of New Jersey, *State v. Cucuel*, 31 N. J. 257, sum up a very able discussion of this question in this manner: "From the foregoing view of the topic discussed, it will be perceived that it was entirely competent for the court to authorize the jury, or any of them, to visit their homes in the company of one of its sworn officers. So it was equally legal for the court to permit, under the same supervision, the jury or any of its members to ride or walk out for exercise. *All that the defendant can demand as a right is that the court should not sanction the withdrawal of the jury, in whole or in part, during the trial from the presence of the court or its officers.*" There is no showing here that this separation, if it might be so called, was not authorized by the court.

But if this can be called a separation, that of itself is not such irregularity as will vitiate a verdict. Although so held in a few cases, the great weight of authority is the other way : hence, if it be shown that there was no possibility of prejudice to the complaining party resulting from such separation, it will not warrant a reversal of the verdict. See the cases on this point fully collated

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in 2 Graham & W. on New Trials, 534. It is true, if there be the least suspicion of abuse or tampering where there is such separation, the verdict will be set aside. But in this case there is nothing shown upon which to ground any such suspicion; and the affidavit of the juror is pointed that he had no conversation with any person respecting the trial. Such affidavit is by the great majority of the courts received to rebut any suspicion of abuse or tampering, and is undoubtedly the better rule. 2 Graham & W. 515.

It may be conceded, that if the party complaining shows such separation as would afford even an opportunity of abuse, that may be sufficient to throw the burden of showing no abuse on the other side. In this case we think there was really no legal separation, and if there were, it is shown by the state that nothing prejudicial to the defendant resulted from it; and thus the case is brought directly within the rule of the general current of decisions, which is that the verdict will not be interfered with.

The second assignment is, the misconduct of one of the jurors, defendant claiming that he became intoxicated while deliberating on the verdict. The mere drinking of spirituous liquors, when not furnished by the prevailing party, is now pretty well established not to be such irregularity or misconduct on the part of the jury as will vitiate a verdict. And so we have held. *Richardson v. Jones et al.*, 1 Nev. 405. It became necessary, therefore, for the defendant to show that the juror drank so much as to produce intoxicating effects upon him, thereby rendering him incapable of considering the case with that clearness, impartiality and calm consideration which is expected of every juror in his deliberation upon a verdict. Whether the juror drank so much as to affect his mental faculties in the least, was a question upon which there was a decided conflict of testimony. The question of the juror's condition was therefore one of fact, with which this court has nothing to do, its jurisdiction being limited to questions of law alone. We may say, however, that a judge at *nisi prius* should never hesitate to set aside a verdict in a criminal case, where there is even a suspicion that any juror was in the least affected by intoxicating

liquor during the progress of the trial, or the deliberation upon the verdict.

The third assignment is, that the court below erred in admitting a deposition in evidence against the prisoner—counsel arguing that, under the constitution of the United States, Art. VI of the amendments, the prisoners were entitled to be confronted by the witnesses against them. But this article of the constitution is applicable only to the federal courts, and is in no wise a restriction upon the power of the states, and in no respect applicable to state courts. *Barker v. The People*, 3 Cowen, 701. It was entirely competent for the state, therefore, to make provision as it has done, that in certain cases and under certain circumstances, depositions may be received against the prisoner. Sections 157 and 171 as amended in 1867, page 125, of statutes of that year. When a deposition is offered, it is true, the person offering it should accompany it with proof that it was taken in conformity with the statute; and, if the proper objection be made, it should not be admitted until such preliminary proof is made. In this case the only objection interposed was, that the deposition was “incompetent evidence.” Such objection was altogether too general to reach the failure on the part of the prosecution to make the preliminary proof that the deposition was taken in accordance with the statute. Had the objection been pointed to, and specified that, as the ground upon which it was made, the state might perhaps very readily have supplied the omitted evidence. But under the general objections here made, it would be impossible to understand that it was intended to rely upon the point that this preliminary proof was not made.

In criminal as well as in civil cases, the objection should be so pointed that the attention of the court below may be directed to the exact point, so that the objection may be then obviated, if it be one of that character. *Kite v. Kimball*, 10 Cal. 277; *Martin v. Travers*, 12 Cal. 244; *Dreux v. Domec*, 18 Cal. 83; *Leet v. Wilson*, 24 Cal. 398. The authorities require the objecting party to place his finger upon the point of objection. If the objection be one which might have been obviated or remedied, as in this case, and the objection is not sufficiently specific, it will not afterwards avail the party. The objection here was too general to entitle the

defendants to rely upon the failure to make the proof preliminary to the admission of the deposition ; because, if specified at the time, it might have been cured. See also *Sharon v. Minnock*, 6 Nev. 377.

It is next argued that the indictment does not conform to the requirements of the statute, and is defective in not charging the "acts of defendants to have been without authority of law, or an equivalent allegation." True, the indictment does not contain the allegation which it is claimed it should, to make it conform to the statutes. It, however, contains all the essential facts constituting the larceny—facts which show that the taking was without authority of law, and was unlawful—and that is sufficient. It is charged that the defendant feloniously did steal, take, and lead away the property of the complaining witnesses ; particularly describing it. This sufficiently shows the fact that the taking was contrary to law, and fully obviates the objection made to the indictment.

Again, it is argued that the judge below erred in addressing the jury in this manner : "The court is not desirous of punishing the jury, but as it is a great expense to the county, and a venire of seventy-five jurors has already been exhausted, and this trial has taken up a great deal of time already, and it is very doubtful if another jury can be got in the county to try these men, I will give you an instruction upon the point on which you were in doubt last night, and it may aid you to make up a verdict." This address was delivered orally, and was excepted to by counsel.

The objection urged against this is, that it is an oral charge, and second, that it had a tendency to prejudice the defendant by urging the jury to avoid further deliberation, or careful consideration of the case, and agree upon a verdict.

The address is not open to the first objection, because it is in no sense a charge. It was not a statement of the law governing the case, nor an instruction in any manner directing the jury how to find the verdict. This was no more a charge than that which came in question in the case of the *People v. Bonney*, 19 Cal. 426, where the jury were told orally that their verdict was not in proper form, and that they must retire and designate in the verdict in which degree they found the prisoner guilty ; and it was held to be no error because not a charge. Nor can we perceive how these remarks

of the judge were calculated to encourage the jury to find an inconsiderate verdict. The law of the case had been previously given to them, and they were fully aware of the gravity of the duty imposed upon them. Clearly, the immediate tendency of these remarks was simply to induce a more careful and anxious consideration of the case—to let the jury understand that they should make an effort to agree upon a verdict simply, but not contrary to the evidence, law, or the rights of the defendants. No such conclusion can properly be drawn from the remarks. Nor would it be warranted when taken in connection with the instructions given wherein the rights of the defendants are fully guarded. It is true such remarks had better not be made, but still in this case we are unable to see that the defendant could have been prejudiced by what was said.

It is further argued that the court erred in charging the jury that “the defendants might be found guilty regardless of the guilt or innocence of Big Ben.” Unquestionably this was correct. The evidence tended to show that the horses were stolen either by the man Jackson or Big Ben, which of the two does not satisfactorily appear, and that the defendants were accessories before the fact. This appears to have been the theory of the prosecution. Now, if the man Jackson stole the property, and the defendants were connected with him, they could be found guilty, regardless of whether Big Ben had any connection with the matter or not. This proposition is self-evident, and this is all that the instruction amounts to when taken in connection with the other portions of the charge, which clearly instruct the jury as to what constitutes an accessory before the fact, and what is necessary to justify his conviction. They learned from that charge that it is always essential that there be a principal in the crime, although under the statute of this state it is not necessary that he be convicted of the crime, or that the accessories be indicted as such: for it is expressly provided that they may be indicted and tried as principals. All that the jury could have understood by the instruction complained of then, was, that although there must have been a principal in the larceny, with whom the defendants should be shown to have been connected, it was not necessary to show that Big Ben was that person.

The refusal to give the instructions asked by defendants was not error, for the reason that the first, second, fourth and fifth entirely ignore the fact that the defendants may have advised and counseled the taking of the horses by some third person, and ask an acquittal, if the jury was satisfied that they did not personally take the property ; whereas, there was some evidence tending to show that they may have so " advised or encouraged " the stealing, and thereby become guilty as accessories.

The third instruction was properly rejected because, under the statute of this state, it is not essential to the conviction of accessories before the fact that the prosecution first prove the guilt of the principal. It was only necessary to show that a larceny had been committed, and that the defendants, if they were present, aided and assisted, or if not present, that they advised or encouraged it. The instruction would seem to assume that the principal should be identified and his guilt proven ; whereas it is only necessary first to prove the unlawful taking, and then that the defendants had such connection with them as would bring them within the statute. But, if it is to be understood by it that it was necessary for the state to establish the fact that a larceny, or the principal offense, had been committed by some one before the defendants could be convicted as accessories, then, although in that light the instruction might be considered correct, still its refusal is not error, for the reason that the court in another instruction had so given the law to the jury, charging them that it was necessary for them to find that the theft had been committed, that the horses had been feloniously taken, before they could convict defendants, and in another instruction the character of their connection with the larceny was clearly and correctly explained. Hence the refusal of this instruction was not error.

The last assignment of error is that the evidence does not warrant the verdict. There is some evidence tending to that end ; enough at least to make their guilt a question of fact, and thus deprive this court of jurisdiction. This may be a hard case ; if so, the board of pardons is the proper tribunal to grant relief.

Judgment affirmed.

RUSSELL SCOTT, APPELLANT, v. MORGAN COURTNEY,
RESPONDENT.

GAMING DEBTS NOT RECOVERABLE. Money won at a public gaming table is not recoverable by action, in this state.

STATUTE LICENSING GAMING ONLY PROTECTS FROM CRIMINAL PROSECUTION. The statute licensing gaming, (Stats. 1869, 119) does not change the old rule of law that money won at a public gaming table is not recoverable by action; it does not pretend to do more than protect the keeper of a public gaming house from criminal prosecution when a proper license is procured.

APPEAL from the District Court of the Seventh Judicial District, Lincoln County.

The facts are stated in the opinion.

Ashley, Thornton & Kelley, for Appellant.

At common law, originally a special *indebitatus assumpsit* might be maintained for money won at gaming; for the contract was not unlawful in itself, and the winner venturing his money was a sufficient consideration to entitle him to the action. *Burling v. Frost*, 1 Esp. 235; 2 Bacon's Abridgement, 450; *Bryant v. Mead*, 1 Cal. 441. Afterward it was held that money won at a common gaming house by the keeper could not be recovered, because gaming under such circumstances came to be considered *contra bonos mores*, and against public policy. The question here is, whether the dealer of a faro game, licensed according to the law of this state, can recover from one who bets at his game on credit, loses, and refuses to pay the sum lost.

The license by its terms authorizes the licensee to carry on the game of faro. Stats. 1869, 119, Sec. 3. The right given by law to deal the game includes and carries with it the right to hold what is won, and to collect what is won where payment is refused. By *licensing* and *authorizing it*, and taking money from the game for the public use, the legislature has determined that it is not *contra bonos mores*, and has provided expressly that it shall not be criminal.

J. C. Foster, for Respondent.

I. By the terms of the statute to restrict gaming, (Stats. 1869, 119, Sec. 3) the legislature has specially declared its intention, which was to protect any person having a license from criminal prosecution, and nothing more. This declared intention precludes any other interpretation as to its effect of the statute.

II. If there were any doubt as to what effect the legislature intended to give to a license, we have the authority of the Supreme Court of California, rendered on a statute similar to our own, for saying it only intended to protect parties who keep a game from criminal prosecution. *Bryant v. Mead*, 1 Cal. 441; *Carrier v. Brannan*, 3 Cal. 328.

By the Court, LEWIS, C. J.:

The facts of this case, as found by the judge below, are: "That during the month of April, A. D. 1871, the plaintiff kept a public gambling room in the house of one M. M. McClusky, in Pioche City, * * * and had therein a public game known as 'faro,' which he, the said plaintiff, dealt, the same having been licensed according to law. That in the fore part of said month of April, the defendant lost at the said game, kept and dealt by said plaintiff, during one evening, the sum of six hundred dollars; and not having the money in his possession, agreed to pay in a few days; that said amount consisted of checks given by said plaintiff to defendant, to play at the game; and that, in a few days thereafter, and during the same month, the defendant paid to the plaintiff the sum of five hundred dollars of the amount lost as aforesaid, leaving the sum of one hundred dollars still unpaid; that at the time the said sum of five hundred dollars was paid, the defendant again played at said game dealt by the plaintiff, and during the evening lost the sum of two thousand dollars. That the sum of twenty-one hundred dollars, lost as aforesaid, is the money for which this action is brought." Upon these facts judgment was rendered against plaintiff, from which he appeals.

Is money won at a public gaming table recoverable by action in this state? is the only question raised upon the record. We con-

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lude it is not. Although, at the common law, gaming, when practiced innocently and as a recreation, the better to fit a person for business, was not in itself unlawful, still, the reluctance and bathing of the English judges to sustain even contracts growing out of such gaming is manifest in every decision announced upon the subject; and the result is, that the right of recovery is burdened with so many restrictions, that at present it can hardly be said the right exists at all. In the United States, wagering and gaming contracts seem to have met with no countenance from the courts, and consequently in nearly every state they are held illegal, as being inconsistent with the interests of the community, and at variance with the laws of morality. 2 Smith's Leading Cases, 343.

But at common law all public gaming houses were nuisances, not only because they were deemed great temptations to idleness, but also because they were apt to draw together great numbers of disorderly persons. 4 Bacon's Abridgement, 451. It would therefore seem to follow, that money won in such house by the keeper could not be recovered, because everything connected with or growing out of that which was illegal partook of its character, and was tainted with its illegality. So gaming, which might be innocent itself if carried on elsewhere, would become illegal by being conducted in a place which was condemned by the law. This is an undoubted principle, applicable not only to cases of this nature but to all cases of analogous character. Thus in *Badgley v. Beale*, 3 Watts, 263, it was held that a marker at an illicit billiard table, who kept the games and received the money bet by the players, was not entitled to recover wages from the owner of the table, the contract of employment being affected with the illegality of the business in which he was employed. There is no doubt whatever that, upon this principle at common law, money won in a public gaming house would not be recovered by the keeper.

Does the statute of this state then, licensing gaming, change the old law in this respect? We think not. The statute does not pretend to do more than to protect the keepers of public gaming houses from criminal prosecution when a proper license is procured. Section 2, declaring that, "The said license shall protect the licensee and his employee or employees against any criminal prosecution for

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dealing and carrying on the game mentioned," thus appearing to restrict the effect of the license to simple protection of the persons engaged against punishment, and leaving gaming houses in all other respects precisely as they were formerly, civilly subject to all the disapprobation and restrictions of the common law. In *Bryant v. Meade*, 1 Cal. 441, it was held that a sum of money won at a public gaming house kept by the plaintiff could not be recovered by him; and the court were of the opinion that a license to keep such house conferred no right to sue for a gaming debt, but constituted a protection solely against criminal prosecution. So, also, it was held in *Carrier v. Brannan*, 3 Cal. 328. If the law in this state did not, in express terms, limit the effect of the license, we would not be inclined to place this construction upon it; but its language, it seems to us, is too plain to admit of any other interpretation.

That the statute of this state expressly authorizes the persons having a license to carry on the game designated, manifestly makes no substantial difference between it and the California act, under which the decisions above referred to were rendered, for it will not be denied that the California license as fully and completely authorized the game licensed, as do those issued under our statute. Clearly, the very object, and probably the only effect, of the California license was to authorize the game licensed. If they did not authorize the game, what was the object of the license at all? It is palpable there is not, in this respect, any distinction between the statutes. The decisions are therefore directly in point.

Let the judgment be affirmed.

By GARBER, J., dissenting:

It may be that this action could not have been maintained at common law. But the only ground upon which it could have been defeated would have been, the illegality of the transaction,—that a common gaming house was unlawful and indictable as a nuisance. With this possible exception, the playing at dice and cards was not prohibited by the common law, in the absence of deception or fraud; and therefore, it is said, playing at dice, cards, &c., is not *malum in se*. Case of Monopolies, 11 Co. 87 (b).

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So, Lord Kenyon directed a recovery for money won at seven-up, and Lord Chancellor Cottenham, apparently without the slightest sense of humiliation, while sitting in a court of equity, held that money won at a public gaming table, or lent for the purpose of gambling, in a country where the games in question were not illegal, might be recovered in the courts of England. *Quarrier v. Tolston*, 1 Phillips, 147. It is a clear inference from his reasoning that, where the government sanctions a public gaming table and receives rent from the keepers thereof, the game is not illegal and money won thereat is recoverable. We have also the authority of Mansfield and Kenyon for the assertion that the English statutes which prohibit certain specified wagers, *e. g.* excessive gambling or gambling on ticket, imply that in cases not specially prohibited by act of parliament, parties might wager or game at pleasure.

Thus the statute Car. II recognizes the common law right of recovery for sums (whatever the amount) won by playing at or with cards or dice, and only restricts such recovery to sums not exceeding £100. See also 1 Phillips, *supra*, where it was held, referring to another statute, that a sum under £10, won at cards, might be recovered. This could not be, if gambling *per se* and without reference to the illegality of the game was either contrary to good morals or public policy, in so far as the courts, for that reason, would refuse to entertain an action based upon such a contract.

It seems to me that our legislature, the final arbiter on questions of policy and morality, has, by this statute, abrogated the only objection to the plaintiff's right of recovery, which existed at the common law. The statute expressly provides that the license shall *by its terms authorize the licensee to carry on the game*. Such a license confers upon and gives to the licensee authority and right to do the very thing we are asked to hold contrary to public policy. See *License Cases*, 5 Wallace, 462, where the distinction is drawn between a license of this kind, and such as are to be regarded as a mere form of imposing a tax, and as implying nothing except that the licensee shall be subject to no prosecution under the law, if he pays a tax; or the distinction between what is in reality, as well as in mere semblance, a license, and what, though nominally such, is in substance only a special tax. The provision giving authority in

terms was not contained in the California statute, construed in the first and third volumes of the reports of that state, and was probably here inserted in view of the distinction taken in the license cases, then recently decided by the highest judicial tribunal in the nation. At any rate, with that opinion before them, the framers of our statute could scarcely have used apter words to preclude the idea that they intended *only* to impose a tax and remit a penalty. The evidence that this unusual clause was directed to be inserted in the license, with especial reference to the opinion in the license cases, is intrinsic and convincing. In that opinion the following language occurs: "It is not doubted that where congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee *authority to do whatever is authorized by its terms*; * * * and the same observation is applicable to every other power of congress, to the exercise of which the granting of licenses may be incident. All such licenses confer authority and give rights to the licensee." It next enunciates the conceded doctrine, that the power to regulate and control any domestic or internal trade or occupation belongs exclusively to the states. The statute in question betrays nowhere the hand of a novice. He who drafted it was evidently master of all the learning bearing on the subject. According to the opinion quoted from, if, following the form of the federal statute therein construed, he had stopped with the provision that any one who should carry on this game without a license should be liable to the penalty imposed, there would have been little room for doubting the intention to "express something more than the purpose of the state not to interfere by penal proceedings with the occupation licensed, if the required fee were paid." Because, although it might have been objected that no authority was conferred *by the terms of the license*; yet, it would have been clear that this was a license granted by the state, in the exercise of an undoubted power to regulate this particular occupation. But, to make assurance doubly sure; in order to leave no room for implication or doubt, it was enacted in the very language of the opinion, that the license should in terms authorize one of the games mentioned in the first

section of the act, and one of the games mentioned in said first section, is *faro*, "*whether the same be played for money or on credit.*"

The court, in the case cited, further say: "This court can know nothing of public policy except from the constitution and the laws. It has no legislative powers. It cannot amend or modify any legislative act. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there, are concluded here." See also 21 How. (U. S.) 425-6, that "when the legislature relieves a contract from the imputation of illegality, neither of the parties to the contract are in a condition to insist upon this objection." And opinion of Judge Gibson, 1 Rawle, 43.

But it is contended, in effect, that the portion of the statute which in terms relieves this transaction from the imputation of illegality, is so limited and qualified by a subsequent clause, that licenses issued under this statute can have no further or other operation than those passed upon in the license cases. The clause relied upon for this position reads: "The said license shall protect the licensee * * * * against any criminal prosecution for dealing or carrying on the game mentioned, in the room described, during said three months, *but not for dealing or carrying on any other game than that specified, or the specified game in any other place,*" &c. This clause does not purport to limit the effect of the statute, or to qualify the sanction expressed, so far as the act done corresponds, in kind, place, and time, with the act licensed. It simply, out of abundant caution, prescribes to the immunity resulting from the sanction given, limits coextensive with those imposed upon the authority conferred; thus at once restricting the immunity to the game, time and place specified in the license, and extending it to the lighter penalty imposed by the general criminal statute, for common law misdemeanors. It seems rather a violent strain of language to consider a declaration that a license shall protect no other game than the one mentioned, equivalent to a declaration that such protection shall be its only effect; and thus, by mere implication, to nullify a previous clause expressly author-

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izing the licensee to carry it on. I think the contention resolves itself into a misapplication of the maxim, *expressio unius*, &c., leading to results inconsistent with the letter and spirit of the statute. For, the intent to legalize the transaction is as clearly expressed as that relied upon to exclude it. While it is true, generally, that what is expressed makes what is implied to cease, it is equally true, that a clause distinct and without exception in itself, cannot be controlled or limited by a doubtful implication drawn from a subsequent clause. 70 E. C. L. Rep. 140. The idea seems to be that the statute grants a sort of secular indulgence — that the game, though licensed, is still illicit; that the licensee has paid the state a handsome *bonus* for permission to violate the law; but that the act is as illegal as ever, the only effect of the statute being, that it cannot be punished *criminaliter*. And the result is, that the landlord, whose tenant the licensee becomes, the employees who assist him, and the tradesmen who sell to him articles to be used in carrying on a business which he has purchased a right to carry on, must refuse him credit or rely on his word for payment.

The reasoning of the California cases is that we must adopt this forced and artificial construction of the statute, rather than impute to the legislature an intent to legalize contracts so tainted with vice and immorality — an imputation, it is said, as unjust to them as the enforcement of such contracts would be humiliating to the courts. But the legislature is presumed to have known the then existing law of this state: that we had adopted the common law, according to which, bets won at seven-up, poker, horse-racing, and an infinity of other wagers, were valid and enforceable contracts: that we had not enacted or adopted the statutory provisions, elsewhere almost universally in force, prohibiting or restricting such gambling, or confining parties playing for money to such sums as they should pay down at the time of the play. If betting at a faro game, licensed and conducted according to the provisions of this statute, is immoral and contrary to the public policy, so is betting at poker and upon horse-racing. It is as humiliating to the courts to enforce the latter as to enforce the former. In giving, then, to the explicit language of the statute its natural force and effect, we only

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impute to the legislature the opinion that such games as this, if conducted in a place less public than the front room of the ground floor of any building, and which no person under the specified age is allowed to enter, stand on the same footing as those games to which, by the common law, no stigma of illegality is attached: and that adults of sound mind may be as safely trusted to bet on credit at the one as at the other.

But, with the wisdom and purity of the sentiments which actuated the legislature, we have nothing to do. Let it be conceded that in this regard both the common law and this statute are as bad as the sternest precisian ever pronounced them. The worse they are, the sooner will a strict enforcement of them lead to their amendment — a corrective by no means so easily applied to an assumption by the courts of legislative functions. For these reasons I dissent from the judgment.

LOUIS SCHISLER *et al.*, RESPONDENTS, v. ROBERT CHESHIRE *et als.*, APPELLANTS.

TREATING JURY TO LIQUOR — WHAT WILL NOT VITIATE VERDICT. Where a jury, on their return from taking a view of the property in controversy, were treated to liquor by a person who had been at the instance of the prevailing party selected by the court to point out the premises, and who had made a map of them for such party: *Held*, that the showing of such person's agency or interest in the result of the suit was not sufficient to vitiate the verdict.

MINING LAW — INSTRUCTIONS SHOULD BE BASED UPON POINTS INVOLVED. Where in a suit to recover possession of a mine, plaintiff asked the court to instruct the jury "that the doctrine that plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendant, has no application in this case: the real question here involved is, which of the parties, the plaintiff or defendant, has the better right to mine the land in question"; and it was claimed that without it the jury might have presumed the title to be in the government, and therefore found against plaintiff; but it appeared that as a matter of fact no suggestion or point of the kind was made on the trial: *Held*, that the refusal to give such instruction was not error.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

Schissler v. Chesshire.

This was an action by Louis Schissler, Edward W. Hooper and L. L. Alexander, against Robert Chesshire, L. Yerk and George H. Allen, to recover possession of sixteen hundred feet of mining ground, known as Burning Moscow, in White Pine Mining District. There was a verdict and judgment for the defendants. Afterwards a new trial was granted, at the instance of the plaintiffs, upon the ground that the furnishing of liquor to the jury, as stated in the opinion, was covered by the decision in *Sacramento and Meredith Mining Company v. Showers*, 6 Nev. 291, and vitiated the verdict. From the order granting a new trial this appeal was taken by defendants.

Hillhouse & Tilford and *D. R. Ashley*, for Appellants.

I. The facts of the case now under consideration are altogether different from those in the case of *Sacramento and Meredith Mining Co. v. Showers*. The treating by Tagliabue was an act done with no reference to the trial then pending — was accompanied by no remark with reference to the case, and was suggested, as he himself states, in consequence of the inclemency of the weather, without the procurement or knowledge of any of the defendants. Tagliabue was in no sense of the term an agent of the defendants; certainly not an agent connected with the management of the case. It is true that he had made a survey for them, but that no more renders him an agent of defendants than the attendance and treatment of a patient by a surgeon or physician constitutes the latter an agent of the former, when called upon to testify on behalf of that patient as to the extent of the injuries or disease he had treated.

II. Admitting, however, for the sake of the argument, that Tagliabue was at any time or for any purpose during the trial an agent of defendants, how long did that relation continue, and how far did it extend? He went on the ground at the request of defendants and by order of court. He then returned. Whatever his relation with defendants in going to the mine with the jury, he could not be said to be an agent after the jury left the mine and when the treating was done. The purpose for which he was requested to act had

been accomplished before the jurymen had taken the drinks complained of.

Harry I. Thornton and *C. H. Belknap*, for Respondents.

I. Tagliabue was the surveyor and witness of defendants; he was their expert, and paid as such; he was their representative in the character of surveyor, expert, witness — and with the zeal and pride of opinion of an attorney to labor with them for a verdict for his side. He was their agent and retainer — as much so as their attorney.

Who, that has observed the trial of a mining case, has failed to notice the extreme zeal and partisanship of the expert? In the solemn character of a witness, he is often more effective than the attorney; and when, as in this case, he has access to the jury, on the trip to the mine, out of the presence of the court, who can estimate fully the effect of his efforts? He is paid beyond measure of ordinary witnesses, in a sum approximating that paid to attorneys; he aids in the preparation for the trial; works with the attorneys; his testimony is almost always the argument of the advocate; a verdict against his evidence is against him, and he will labor for his side with the jury to prevent it. See *Sacramento and Meredith Mining Company v. Showers*, 6 Nev. 291.

II. It is admitted that in going to the mine Tagliabue was the agent or representative of defendants, by contending that his agency ceased when he left the mine. Certainly, it could not cease until the return into court; certainly, not while he had the permitted association with them on the trip going, staying, and returning.

III. The court erred in refusing the instruction asked for. The instruction expressed a principle of law correct in the abstract, applicable in the concrete, and couched in unexceptionable language. *Richardson v. McNulty*, 24 Cal. 347. The necessary impression resulting from the refusal was, that we should have done something more than prove a better right than the right of the defendants.

By the Court, LEWIS, C. J.:

The appellants having obtained a verdict in this cause, the learned judge below set it aside, upon a showing, as it is supposed, that improper civilities had been shown to the jury by Mr. Tagliabue, one of the witnesses, and, as it is claimed, an agent for the appellant. It appears that it became necessary for the jury to go upon the mining claim in controversy for the purpose of familiarizing themselves with certain locations and situations in question in the case.

To this end, it was agreed that each party should designate a person to be appointed by the court to accompany the jury, for the purpose, as stated by the judge below, of pointing out to them the points in regard to which testimony would be given at the trial. The appellants designated for this purpose Mr. Tagliabue. He, with the person appointed by the respondent, together with the sheriff, accompanied the jury to the ground, where the proper explanations were made. On their return, the coach, occupied by Tagliabue and some of the jurors, stopped at a public house, and he invited them to alight and take a drink of liquor with him at the public bar. Several of the jurors accepted his invitation, and drank with him. Further than this, nothing of an improper character appears to have taken place. Tagliabue had, prior to the trial, been employed by the appellants to make a map of the mine, and they had designated him as the person whom they desired the court to appoint to accompany the jury, as already stated. Beyond this he does not seem to have had any relations with the appellants, nor interest of any kind in the suit. It does not appear that he was called as a witness, even, except to the one point of identifying the map made by him. But considering him to be an agent or representative of the appellants, the consequences of his civilities to the jury were for that reason held to be chargeable upon them, and it was thought the case came within the rule announced in *Sacramento and Meredith Mining Company v. Showers*, 6 Nev. 291.

It is very clear to us, however, that the facts of this do not bring it within the rule of that case. If Tagliabue were an agent, managing the suit, or if he had any interest in the controversy with the

appellant, undoubtedly that would bring the case within the rule of that referred to. But nothing of the kind appears. For aught that is shown in this record, Tagliabue was no more interested in having a verdict rendered in favor of the appellants than of the respondents. That he had been employed to make a map of the mine for appellants, certainly indicates no interest in favor of them. He may have done that, and still continued utterly indifferent between the parties, or even been interested against the appellants; and that, too, was an employment which had been completed before the suit. His selection by them to accompany the jury to the ground, which was simply for the purpose of "pointing out the points respecting which testimony was to be introduced," surely does not indicate any interest on his part in favor of appellants. He may have been selected for that purpose, although entirely indifferent. Nothing could be presumed from such selection, except perhaps that he was familiar with the ground in controversy.

Indeed, there is nothing here inconsistent with entire impartiality or indifference on the part of Tagliabue; and the presumption is, nothing to the contrary appearing, that he was so. As is very well said by counsel for appellants, "His employment to make the map no more constituted him an agent in the action than the employment of a physician, who may afterwards be called upon to testify respecting the disease of his patient, could be considered such." And as to his selection to accompany the jury to the mine, which, it must be remembered, was only for the purpose of designating certain points about which testimony was to be offered, that no more constituted him the agent of the appellants than of the respondents. His authority and appointment for that purpose were derived from the court—the appellants simply designated him as the person whom they desired to have the court appoint. It seems to us that the very meagre connection which Tagliabue had with this case is not sufficient to bring it within the rule of *Sacramento and Meredith Mining Co. v. Showers*.

The reason of that rule is stated to be, to prevent the jury from being *tempted* to find a verdict against their unbiased sense of the right of the case, by motives of gratitude or of feelings for favors, however slight. Now, how could the treating of the jury in this

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case have any such influence, when it really does not appear that they had any reason to believe that Tagliabue had any interest as to how the verdict might be rendered? If they had no more from which to judge of that fact than we have, they could only have concluded that he was entirely indifferent, and therefore any civilities from him could not in any way have influenced their verdict one way or the other. It would be the same as if an entire stranger had done the same thing. We cannot see that the facts detailed in the record bring this case within either the letter or the spirit of the rule in *Sacramento and Meredith M. Co. v. Showers*, nor that the civility shown to the jury by Tagliabue can be considered such irregularity as will authorize a disturbance of the verdict.

The other ground upon which counsel for respondents endeavor to sustain the order, is equally untenable. It was based upon the refusal of the court to instruct the jury that the "doctrine that the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendant, has no application in this case. The real question here involved is, which of the parties, the plaintiff or defendant, has the better right to mine the land in question." The manner in which it was supposed the refusal of this instruction prejudiced this respondent is, that without it, the jury might have presumed the title to be in the government, and upon that ground found against the plaintiff; and to guard against such result alone it seems to have been asked. Had the jury relied upon any such presumption, they would have relied upon a point which does not appear to have been in any way suggested in the case; and, furthermore, against the whole theory of the trial and the instructions given by the court. Among many others of a similar character, they were charged that if they believed from the evidence that the predecessors of plaintiffs posted the notice of the Burning Moscow claim at the point marked, the initial point on plaintiffs' map, on the twenty-third day of December, A. D. 1868, and did two days' work at the point called Burning Moscow shaft on plaintiffs' map, prior to the sixth day of January, 1869, and filed the notice of location in the district recorder's office on the twenty-third day of December, 1868, and that plaintiffs and their predecessors have done two days' work on said claim within each year

after the twenty-third day of December, 1868, they must find a verdict for the plaintiff." How, with such an instruction given to them, could the jury have come to the conclusion that the plaintiff could not recover if the legal title was in the United States, or that it was necessary for him to prove more than they were here told was sufficient to entitle him to recover? We cannot suppose that the jury found a verdict against the plaintiff upon a ground not suggested in the case, and that, too, contrary to the whole theory of the case, and the instructions given to them by the court. To protect him from such possibility, it would appear unnecessary therefore to charge that it was not necessary that the plaintiff should recover upon the strength of his own title, for without it, it would appear *impossible* to suppose that the jury could have found against the plaintiff upon that ground.

Indeed, the jury are over and over again charged, in effect, that they should find a verdict in favor of him who had the better right to mine the ground in controversy, which clearly shows that the absolute legal title was in no way involved. And the question of the real rights of the parties was fully and clearly submitted to the jury, so that the latter portion of the instruction refused was substantially given in several instructions, and so clearly that there could be no mistake about it. Thus the first clause of the instruction was unnecessary for the purpose claimed by counsel, and the second was substantially given. There was therefore no prejudicial error, even if the instructions given were technically correct.

Not only was it useless to give it, but its direct effect would have been to mislead the jury. Upon this point what is said by the district judge, in his opinion, very satisfactorily disposes of it. "It may be true," he says, "that, in the case of unpatented mines, the ultimate title is in the government. But the presumption is, that the title is in the occupant—a presumption which courts will not allow to be rebutted by showing title in the government, which they sustain by the fiction of a supposed grant. But besides that, this is the theory upon which these actions have constantly been maintained; the object of instructions is to instruct the jury, and not to mystify them; but I think the only effect of giving the instruction asked would have been to confuse the jurors. The right of a man

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to mine on a particular vein of ore in this country, gained by compliance with the mining laws, which by adoption are a part of the law of the land, is not only popularly regarded as a *title* to the ground, but is so designated in acts of congress, of the state legislature, and in the opinions of courts. In fact, it is a sort of title; and, though not a perfect or complete title, is the only one we have ordinarily to deal with, and the use or sense of the word employed in connection with these cases can never be misunderstood, or tend in the slightest degree to mislead the jury."

The rights acquired simply by priority of occupation being so generally called a title, and so recognized, as stated by the judge, and there being no possible ground for apprehension that the jury would find against the plaintiff, simply because the real title was in the government, the instruction was only calculated to confuse them, without the possibility of doing any good. Its refusal was therefore not error.

The order granting a new trial must be reversed. It is so ordered.

GARBER, J., having been counsel in the court below, did not participate in the foregoing decision.

THE STATE OF NEVADA, APPELLANT, v. HENRY A. RHOADES *et als.*, RESPONDENTS.

STATE TREASURER'S BOND — MONEY RECEIVED DURING FORMER TERM — PRESUMPTIONS. In a suit on the official bond of a State Treasurer, given for his second term of office: *Held*, that whatever money be received in his official capacity during his first term, in the absence of proof that he had wasted or misapplied it, was presumably paid over to himself as his own successor, and that the sureties on such bond were liable for the safe-keeping thereof.

LIABILITY OF STATE TREASURER'S SURETIES FOR "SPECIAL DEPOSITS." All special deposits paid into the state treasury under the provisions of the Act of 1867, for the conditional purchase of state lands, (Stats. 1867, 166, sec. 5) are received by the State Treasurer in his official capacity; and the sureties on his official bond are liable therefor, as for other moneys.

QUALIFIED PROPERTY OF STATE IN "SPECIAL DEPOSITS" IN STATE TREASURY.

Though the state may not have the absolute, present right of property in the

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"special deposits" paid into the state treasury under the provisions of the land act of 1867, (Stats. 1867, 166, sec. 5) it has the right of present possession and custody, coupled with a contingent interest, and may maintain an action therefor.

PLEADING—EVIDENCE NOT OBJECTIONABLE BECAUSE COMPLAINT NOT PARTICULAR ENOUGH. Where a complaint against the sureties of a State Treasurer alleged a conversion of money belonging to his office, and moneys of the state, to the extent of \$106,432.88, and that no portion of the same was delivered to his successor: *Held*, that though such a pleading might be obnoxious to a demurrer, or motion for greater particularity, no objection to evidence sustaining the facts so pleaded could be made upon any such ground.

ACTION ON CONTRACT BY PARTY HAVING INTEREST IN ITS PERFORMANCE—DAMAGES. A party with whom a contract is made, and who has an interest in its performance, can recover the amount of damages sustained by its non-performance.

ACTION AGAINST STATE TREASURER'S SURETIES FOR "SPECIAL DEPOSITS"—MEASURE OF DAMAGES. In a suit against the sureties of a State Treasurer for the loss of "special deposits" paid in under the Act of 1867, (Stats. 1867, 166, sec. 5) the measure of damages is the amount of the deposits, unless a non-approval of the land locations for which the deposits were made, or an actual repayment to or release by the depositor, or something equivalent thereto, is shown in mitigation.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action by the state against Henry A. Rhoades, administrator to the estate of Eben Rhoades, deceased, late state treasurer, and twenty-eight other defendants, who were sureties on the official bond of said Rhoades, deceased, as such treasurer. The action was commenced on March 19th, 1870. A former appeal in the same case will be found, reported under the same title, in 6 Nev. 352. After the remittitur from that appeal was sent down, the cause came up again for trial at the August term, 1871, of the district court, and resulted in a verdict and judgment for defendants. A motion for a new trial having been denied, the plaintiff took this appeal.

The facts, necessary for an understanding of the decision, are stated in the opinions.

L. A. Buckner, Attorney General, and *A. C. Ellis*, for Appellant.

As to the error of the court below in excluding any evidence relating to the special deposits, our views were presented at length upon the oral argument. But it is contended that there is no law making the state responsible to the depositor for the moneys so deposited with the treasurer. This we deny. The duties imposed by the law in this connection, (Stats. 1867, 166, Sec. 5) are all upon the treasurer. They are matters pertaining to his office. He is required to keep an account of the moneys so received upon his books, and as treasurer, to return the moneys to the person entitled thereto, if from any cause the purchase cannot be completed. But the money is absolutely the state's after deposit, provided the purchase can be completed; and in any event, the treasurer must either carry the money to the proper fund account, or otherwise dispose of it according to law; that is to say, he or his successor must pay it over to the person entitled thereto, in case of no purchase, and in case of purchase to carry the money to the proper fund. It is his duty to turn over to his successor in office all books, papers, property and money *pertaining to his office*.

Mesick & Wood for Respondents.

I. The burden of proof was on the plaintiff to satisfy the jury of the truth of the allegation in its complaint, to the effect that the defalcation occurred in respect of moneys had and received by Rhoades as state treasurer, subsequent to the thirtieth day of January, A.D. 1867, and converted to his own use prior to the ninth day of September, 1869, belonging to the state, &c. This the state failed to prove, except through the medium of a presumption that the money was actually in the treasury which the accounts indicated should be there. As a matter of proof, no one could tell what money was in the treasury at any particular time, or when the defalcation occurred. The testimony shows, as far as it shows anything on the subject, that it occurred prior to the thirtieth of January, 1867, when the bond in suit was given; and if it be not plain that the entire defalcation occurred prior to that date, it is certain from the evidence that a very large proportion of it occurred before then; and what proportion, if any, occurred subsequently, there was no testimony to show. The jury was justified in coming to the con-

clusion that most if not all of the defalcation complained of occurred prior to the thirtieth of January, 1867, and that if any part occurred subsequent to that date, it was impossible to tell from the evidence what part.

II. The plaintiff was permitted to show what portion of the special deposits became the property of the state by sales of lands being perfected. The only moneys which were excluded from the consideration of the jury, were those deposited on applications for the purchase of lands, which were not shown to have been acted upon by the state. Money in that state could, in no sense, be the property of the plaintiff. The treasurer held the money as the property of the depositor, until the state should render him an answer to his application, establishing a bargain between the parties and binding on both parties. It seems clear that if the state had no property in the money, it could lose nothing by a misappropriation of it; and having lost nothing, could recover nothing from any one on account of the misappropriation; nor was the state responsible to the depositor for the safe keeping of this money. It had not agreed to be so responsible in specific terms, according to any law or contract appearing. The state had only said to those wishing to purchase lands: "If you will make an application and a deposit of earnest money, we will consider your application." Nor is there any implied obligation on the part of the state to be responsible for the money, or to refund it in case of its loss. The depositor is the only person who could maintain an action for the loss or misappropriation of the money, before there was any determination whether the application to purchase would or would not be accepted. And if so, then *non constat*, but that the depositors have all collected their money from the administrator of the estate of the treasurer, Rhoades.

III. Again, the pleadings did not warrant a recovery of the amount of these special deposits from the defendants, nor the admission of the evidence offered in relation thereto, for the reason that the complaint was not sufficiently specific to cover the case, and the plaintiff would not make it so by amendment. *Goulet v. Asseler*, 22 N. Y. 225.

[Many other points were discussed by counsel; but as they were not passed on by the court, they are omitted.]

By the Court, GARBER, J. :

The defendants are the administrator and sureties of the former treasurer of this state. The complaint sets forth the bond, which is conditioned : “ That the said treasurer shall well, truly, and faithfully perform and discharge the duties of treasurer of the State of Nevada, as required by law, as well those which may be required of him by any law now existing, as those which may be required by any law enacted subsequently to the execution of this bond ; and shall deliver to his successor in office all the books, papers, money, vouchers, sureties, evidences of debt, and effects belonging to his said office.”

In determining the extent of the liability of the defendants, we must be governed wholly by the terms of the contract sued on. The law on this subject is well stated in *Thompson v. Board of Trustees*, 30 Ill. 99. There the defense to an action of debt, on a similar bond, was, that certain funds deposited by the treasurer had been stolen. The Court, overruling this defense on the ground that he was an insurer of the funds, say : “ In no sense is this a case of bailment. The liability of the treasurer arises out of his official bond. He has made by that bond an express contract with the trustees, that he will keep safely the moneys which shall come to his hands. It is so ‘ nominated in the bond,’ when that is read in the light of the statute prescribing his duties, and considerations of public policy forbid that he should be permitted to avail of any extraneous fact outside of the condition of the bond. The treasurer well knew and understood the contract he had entered into, and the extent of the obligation he had voluntarily incurred, and he has obtained all he contracted for—the possession of the office, with the emoluments attached to it. We think there is no principle on which the defense can be sustained, the contract being absolute, without any condition express or implied. In these days of remorseless speculation upon the public by its functionaries—indeed, at all times—public policy demands that depositaries of the public money should be held to the most rigid accountability, within the terms and scope of their covenants.”

Whatever money Eben Rhoades received, in his official capacity,

during the term previous to that for which this bond was given, in the absence of proof that he had wasted or misapplied it during his first term, was presumably in his hands at the expiration thereof, ready to be paid to his successor. And he is to be regarded as his own successor, and to have received, in his new official capacity, what it was his duty to pay in his old. 7 Jones, (Law) 382.

His contract was to deliver to his successor all the money belonging to his said office. All special deposits, made and receipted for under section five of the statute of 1867, (p. 166) constituted a portion of the money belonging to said office. Such moneys are received by the treasurer in his official capacity. His only right to keep them is by virtue of his office; and to that right his successor, as such, succeeds. It may be that the state has not the absolute, present right of property in these deposits, but she has the right of present possession and custody, coupled with a contingent interest. The interest of the depositor is equally contingent—a right to a return of the deposit on the happening, or rather on the non-fulfillment, of a specified condition. The money is pledged upon condition that it shall be returned if the purchase cannot be completed. Both the pledger and pledgee have a qualified, but neither of them an absolute, property in the deposit. The pledger's property is conditional, and depends upon the non-approval of the location, &c.; and so, too, is that of the pledgee, which depends upon her ability to convey the land. (2 Black Com. 396.)

In order to protect both these interests, it was eminently proper that the money should be committed to the custody of the chosen officer of the state for the time being, and it was for the state alone to dictate the rights and duties of the custodian. The defendants have contracted with the state for the faithful performance of these duties, and one of the most important of them was the delivery of these deposits to the successor of Eben Rhoades. Without the custody of these moneys, his successor could not "issue his ordinary receipt, and transfer the amount to its proper fund account, or refund the deposit to the person entitled, taking receipt therefor, &c."

The language "moneys belonging to an office," is certainly broad enough to embrace deposits, the possession and control of which is

essential to the proper performance of the duties of that office—to comprehend as well moneys held in pledge by the state for her own security, as any other funds directed by law to be kept by her treasurer—and it cannot have been contemplated that, on the approval of a location, the state should be compelled to issue a patent to the purchaser, in the expectation of a voluntary restoration of the deposit by the outgoing treasurer, as the only alternative to a suit for its recovery; or that, on its non-approval, the depositor, instead of obtaining his money by a return of the deposit receipt to the state treasury, should be compelled to hunt up the ex-official or proceed against his bondsmen. The plaintiff should have been permitted to prove the whole amount of special deposits received by Eben Rhoades, as directly tending to establish the breach of contract alleged in the complaint. The complaint, in terms, alleges a conversion of moneys belonging to the office of said Rhoades, and of moneys of the state to the extent of \$106,432.88; and that no portion of said sum was delivered to his successor in office. If the complaint is defective in this particular, the defect consists in the manner of alleging the fact of a failure to deliver these deposits, and not in the absence of any allegation of such fact. Such a pleading may be obnoxious to a demurrer or a motion for greater particularity; but an objection to evidence sustaining the fact so pleaded should not be sustained. The question on the admission of the evidence is not whether the fact is stated with sufficient particularity. Here the evidence was not even objected to on that ground. The objection was confined to the point that the moneys on special deposit did not belong to the state. But the defendants were in no position to raise any question as to the ownership of this money. If it should turn out to belong to the depositors, the state would be honorably, if not legally, bound to refund it. And the state had contracted that it should always remain in the custody of her treasurer, in order so to enable her to restore it to the depositor, or to appropriate it to her own use, as the contingency might happen. Surely, the party with whom a contract is made, and who has an interest in its performance, can recover the amount of damage sustained by its non-performance. The measure of damage here is the amount of the deposits—unless a non-approval, followed

by an actual payment to or release by the depositors, or something equivalent, is shown in mitigation.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

By WHITMAN, J., dissenting:

The contract of respondent was for the faithful performance, by treasurer Rhoades, of the duties of his office as such treasurer, as the same were defined by law at the date of the bond, or might thereafter be regulated.

In 1867, the legislature passed an act, in which occurs the following section: "Sec. 5. Upon the written application of any person to the register for the location of lands which such person may desire to purchase from the state, accompanied by a certificate of the state treasurer, that said person has made special deposit in his office of the purchase-money for said lands, the register shall include the same in the list of selections for the month. And the state treasurer is hereby authorized to receive, on special deposit, all sums so tendered, and give receipts therefor; and he shall keep a separate account thereof on his books, and said moneys shall not be used or appropriated for any purpose whatever while upon his books as a special deposit; but when the contemplated entry can be completed, in whole or in part, upon return of the deposit receipts, the treasurer shall issue his ordinary receipt for the amount necessary to effect the purchase, and transfer the amount to its proper fund account. If, from the non-approval of the location, or other cause, the whole or any portion of said deposit cannot be applied to the payment for lands originally entered, then, upon return of the deposit receipt, the treasurer shall refund the proportionate, or whole amount, of such deposit to the person entitled thereto, as such person may elect, taking receipt therefor." Stats. 1867, 166.

This language seems to me so entirely plain, as to require no comment. Still, it may not be amiss to call attention to the specially salient points, that the state treasurer is not commanded in usual language, but simply authorized to receive the money as the money of the applicant, giving a special receipt therefor; that the same is

not put into the treasury, nor carried on the books as money belonging to the state, nor allowed to be used or appropriated in any manner, until upon completion of the entry of the land and surrender of the special receipt, one issues in ordinary form; and the treasurer receives the money for the first time as treasurer, and passes it as the money of the state into its vaults. I entirely fail to comprehend how any such transaction comes within the purview of the duties of state treasurer, as such.

At the trial, appellant was allowed to show the amount of money coming into the hands of Rhoades under this law, which absolutely belonged to the state; but was refused the opportunity of showing any other sum, or the whole amount received thereunder. The ruling the majority of the court pronounces error; to me it seems correct. The contract was to secure against malfeasance, as treasurer of state funds—not as banker or bailee of the money of A B or C.

The state is now seeking to hold the bondsmen of Rhoades for moneys which do not at present belong to it, and may never do so. In case the selection of land is not approved, the applicant may withdraw his money. It would undoubtedly be competent in every case for the legislature to permit the citizen to rescind his contract before its completion; and thus is presented the anomaly, if such claim be allowed, of making the bondsmen practically, though indirectly, liable to private citizens for their stolen moneys.

It is said that this is correct, because the state would be legally held, if it would be sued, to reimburse the parties losers. Admit the proposition morally sound, but legally doubtful; and still I cannot see how the result reached, either necessarily or logically, follows. The state may be held to such course, but it cannot so hold the bondsmen, unless such was their contract. Rhoades may perhaps have been so far the agent of the state in this transaction that it will be holden for his acts; but he was, in pursuance of a duty foreign to that of treasurer, or which could constitutionally be imposed on him as such. Of course Rhoades was liable, because he accepted the trust, which he might have properly refused, as not belonging to that capacity in which he had agreed to act; but his acceptance could, in no wise, alter the position of his bondsmen, who

have the right to claim their legal status, and to refuse to be placed on any other. No doubt, a great wrong has been done the people of this state ; but that is, in no manner, compensated by injustice to such thereof as may happen to be upon the bond in suit. This, in my opinion, would be the case, if they are to be held as demanded.

Many assignments of error appear in the record, some or all of which may be good ; but as the case goes back for a new trial, my opinion thereon would be of no effect ; so I content myself with dissenting from the opinion rendered, passing entirely the other errors suggested.

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- **TRIAL OF ACCESSORIES BEFORE THE FACT—CHARGE AS TO PRINCIPAL.** Where, on a trial for grand larceny of horses, the evidence tended to show that they had been stolen either by Jackson or by Big Ben, and that defendants were accessories before the fact; and the court charged that, "The defendants might be found guilty, regardless of the guilt or innocence of Big Ben"; *Held*, it appearing that other portions of the charge clearly showed what constituted an accessory before the fact and what was necessary to justify his conviction, that the instruction was unobjectionable. *State v. Jones and Nery*, 408.
- **GRAND LARCENY—INSTRUCTION IGNORING THAT ACCESSORIES MAY BE GUILTY AS PRINCIPALS.** Where instructions in a grand larceny case ignored the fact that defendant may have advised and counseled the felonious taking by a third person, and asked an acquittal unless it appeared that defendant personally took the property: *Held*, properly refused. *State v. Jones and Nery*, 408.
- TRIAL OF ACCESSORY BEFORE THE FACT—PROOF OF GUILT OF PRINCIPAL NOT NECESSARY—see CRIMINAL LAW, 17.**

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1. NO PRESUMPTION OF RECEPTION BY PRINCIPAL OF MONEY FRAUDULENTLY OBTAINED BY AGENT. There is no presumption of law that a principal receives money which his agent obtains by a wrongful act of his own, in no wise authorized or sanctioned by the principal. *Dougherty v. Wells, Fargo & Co.*, 368.
2. UNAUTHORIZED ACTS OF AGENT NOT DONE AS AGENT. No one can be the agent of another in the doing of an act which is in no wise authorized by, or which may be done against the expressed wish of, the principal. *Dougherty v. Wells, Fargo & Co.*, 368.

WHEN PRINCIPAL LIABLE FOR UNAUTHORIZED ACTS OF AGENT. Where, in an action against Wells, Fargo & Co., it appeared that plaintiff delivered an old certificate of deposit to the agent of the company, for the purpose of having it sent to San Francisco to be renewed; and the agent fraudulently procured it to be cashed, and appropriated the money to his own use: *Held*, that Wells, Fargo & Co. were liable, not upon the rule that the agent acted for his principal in that particular transaction, but because he was employed by the company in that character of business, and held out by it as a person authorized and fully to be trusted. *Dougherty v. Wells, Fargo & Co.*, 368.

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WITHDRAWING STATEMENT FOR CORRECTION—see **APPEAL**, 6.

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- 1. **RECORD ON APPEAL MUST SHOW ACTION APPEALED FROM.** Where an appeal purported to be from an order overruling a motion for new trial, and the record failed to show that the motion had been disposed of, or acted on: *Held*, that the appeal was premature and should be dismissed. *Kalmes v. Gerrish*, 31.
- 2. **IRREGULARITY WHICH MIGHT BE PREJUDICIAL.** On appeal from a conviction in a criminal case, any irregularity which *might* have affected the verdict will throw upon the state the burden of showing that it was not and could not have been prejudicial to defendant. *State v. Parsons*, 57.
- 3. **NO INQUIRY AS TO INSUFFICIENCY OF EVIDENCE WHERE RECORD DEFECTIVE.** The Supreme Court will not consider an objection on a criminal appeal that the verdict was not justified by the evidence, if the bill of exceptions and statement fail to show affirmatively that they contain all the evidence tending to prove the facts, as to which an insufficiency of evidence is alleged. *State v. Parsons*, 57.

PRACTICE ON APPEAL—POINT NOT MADE BELOW. Where, in a suit on an unauthorized contract for services at a certain sum, claimed to have been subsequently ratified, defendant, in addition to a general denial, pleaded that the services were only worth a much smaller sum, which he tendered; and on the trial there was no claim that such plea of tender was any admission of the contract: *Held*, that such point could not be made for the first time in the Supreme Court, for the reason that there was there no opportunity to amend, which defendant would have had if the point had been made below. *Clarke v. Lyon County*, 75.

JOINT JUDGMENT—AFFIRMANCE IN PART AND REVERSAL IN PART. Where a joint demurrer to a complaint was sustained, and judgment entered for defendants dismissing the action; and on appeal it appeared that the demurrer was

- not well taken as to one of the defendants: *Held*, that as to such defendant the judgment should be reversed, and affirmed as to the others. *Wood v. Olney*, 109.
6. **DISMISSAL OF APPEAL "WITHOUT PREJUDICE."** Where it appeared upon appeal that the statement sent up had not been settled by the judge below; and on appellant's motion for leave to withdraw it for correction, the appeal was dismissed "without prejudice," and after correction the case was again taken up: *Held*, that the dismissal of the first appeal did not operate as an affirmation of the judgment, or prevent the second appeal. *Cooper v. Pacific Mutual Life Ins. Co.*, 116.
 7. **CONSIDERATION ON APPEAL OF EVIDENCE EXPLAINING POINTS OF LAW.** Though the Supreme Court cannot, where there has been no motion for a new trial, weigh the evidence for the purpose of determining whether a verdict or judgment is sustained by it, yet any question of law arising at the trial and properly excepted to can be reviewed without a motion for new trial; and in such case as much of the evidence as may be necessary to explain the legal question may be taken up and considered. *Cooper v. Pacific Mutual Life Ins. Co.*, 116.
 8. **APPEAL ON RULINGS—MOTION FOR NEW TRIAL NOT NECESSARY.** A motion for new trial is not only unnecessary to authorize a review of rulings at the trial; but the much preferable practice is to take them up by bill of exceptions or statement on appeal. *Cooper v. Pacific Mutual Life Ins. Co.*, 116.
 9. **DEFECTS OF FORM IN INDICTMENT—OBJECTIONS TO BE MADE BELOW.** Objections to the form of an indictment for defects apparent upon its face cannot be taken advantage of for the first time on appeal. *State v. O'Flaherty*, 153.
 10. **INSUFFICIENCY OF EVIDENCE TO BE SPECIFIED—PRESUMPTIONS IN FAVOR OF RESPONDENT'S TESTIMONY.** Upon an appeal on the ground that the judgment is not justified by the evidence, the Supreme Court will confine itself to the particulars specified in the statement; and in case of material conflict, it will assume the facts as testified to on the part of respondent. *Gerhauser v. North British and M. Ins. Co.*, 174.
 11. **ADMISSION OF IMPROPER TESTIMONY MUST BE AFFIRMATIVELY SHOWN.** Where it was objected on appeal that a witness had been allowed to answer an improper question, but the record failed to show what the answer was: *Held*, that the presumption was that the answer was harmless. *Gerhauser v. North British and M. Ins. Co.*, 174.
 12. **ARGUMENTS ON APPEAL OUTSIDE OF RECORD.** The Supreme Court will not consider questions argued before it, when the facts and proceedings upon which such arguments are based are not brought up in the record or properly presented. *Rogers v. Cooney*, 213.
 13. **CLERICAL ERROR IN JUDGMENT MUST BE PRESENTED BELOW.** Where on appeal it appeared that there was a clerical error or mistake to the extent of five

dollars in a judgment, and the attention of the court below had not been called to it: *Held*, that the point could not be made in the appellate court. *Ehrhardt v. Curry*, 221.

4. **APPEAL—TRANSCRIPT WITHOUT STATEMENT.** Where a transcript on appeal contained neither a statement on motion for new trial nor on appeal: *Held*, that there was nothing in it for review except the judgment roll. *McCausland v. Lamb*, 238.
5. **CLERICAL MISTAKE IN JUDGMENT—ERRORS NOT NOTICED BELOW.** Where on appeal from a judgment it appeared that there was a clerical mistake in the rate of interest, but such mistake had not been brought to the attention of the court below: *Held*, that the Supreme Court would not notice it. *McCausland v. Lamb*, 238.
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7. **INSUFFICIENT SHOWING IN BILL OF EXCEPTIONS—IRREGULAR IMPANELMENT OF JURY.** Where an objection was made in a criminal case to the panel of trial jurors, but the bill of exceptions, which was supposed to raise the point, failed to show the facts, and the judge below in certifying it expressly stated that the facts upon which the point was based were not as assumed by counsel: *Held*, that there was no showing of irregularity, and that the point raised could not be considered. *State v. Roderigas*, 324.
8. **WEIGHT OF EVIDENCE NOT OPEN TO DISCUSSION WHERE NO MOTION FOR NEW TRIAL.** The point that, where there has been no motion for new trial, the Supreme Court will not consider an objection that the evidence does not sustain the verdict and special findings, has been so frequently decided that it is no longer open for discussion. *Conley v. Chedic*, 336.
9. **ONLY PREJUDICIAL ERROR GROUND OF COMPLAINT.** Though irrelevant issues or facts admitted by the pleadings are submitted to the jury, yet if a party be not prejudiced thereby, he has no substantial ground of complaint. *Conley v. Chedic*, 336.
10. **GROUND FOR NONSUIT MUST BE SPECIFICALLY STATED.** Where a motion for nonsuit was made in the district court upon a certain specified ground, and properly denied, so far as that ground was concerned: *Held*, that the motion could not be sustained in the Supreme Court upon a ground not suggested in the court below. *Dougherty v. Wells, Fargo & Co.*, 368.

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CERTIFICATE ON INFORMATION NOT CERTIFICATE OF FACT. A person who certifies
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WHAT RETURN MAY INCLUDE. Though the return to a writ of certiorari may include, in addition to the record properly so called, such orders and proceedings in the nature of record, and so much of the evidence as may be necessary to decide the question of jurisdiction, it cannot include matter which is neither part of the record nor of the proceedings before the inferior tribunal, such as affidavits presented to the clerk of such tribunal after the issuance of the writ, or certificates based thereon. *State ex rel. Thompson v. Board of Equalization of Washington County*, 83.

WEIGHT OF EVIDENCE NOT SUBJECT TO REVIEW. Where on certiorari from an order of county commissioners discharging a supplemental return, the record showed that the commissioners acted within their jurisdiction; and it was objected that the evidence was in conflict with the return: *Held*, that the question as to how they acted was not a proper subject for review on certiorari. *State ex rel. Mason v. Ormsby County Commissioners*, 892.

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a railroad company running alongside of it; for the reason, among others, that it does not carry persons in such a manner as to interfere with the collection of tolls from "persons traveling over and along said road." *Lake v. Virginia and Truckee R. R. Co.*, 294.

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1. **CERTIORARI—INADMISSIBLE RETURN—MOTION TO STRIKE OUT.** Where on certiorari to review the proceedings of the board of equalization in reference to the reduction of an assessment against a railroad company, the clerk of the board was directed to certify whether it appeared before the board that the company served a statement of its taxable property within the time prescribed by law; and the clerk returned a certificate that it was proved before the board that such a statement had been furnished within the time, but went on to show that his certificate was based upon the sworn statements of others, who composed the board at the time, and not upon his own recollection or the records of the board: *Held*, that such certificate was entirely inadmissible; and on motion it was stricken out. *State ex rel. Thompson v. Board of Equalization of Washoe County*, 83.
2. **CERTIORARI—WHAT RETURN MAY INCLUDE.** Though the return to a writ of certiorari may include, in addition to the record properly so called, such orders and proceedings in the nature of record, and so much of the evidence as may bear upon the question of jurisdiction, it cannot include matter which is neither a part of the record nor of the proceedings before the inferior tribunal, such as affidavits presented to the clerk of such tribunal after the issuance of the writ, or his certificate based thereon. *State ex rel. Thompson v. Board of Equalization of Washoe County*, 83.
3. **CERTIORARI—WEIGHT OF EVIDENCE NOT SUBJECT TO REVIEW.** Where on certiorari from an order of county commissioners discharging a supplemental assessment, the record showed that the commissioners acted within their jurisdiction; and it was objected that the evidence was in conflict with the order: *Held*, that the question as to how they acted was not a subject of review on certiorari. *State ex rel. Mason v. Ormsby County Commissioners*, 892.

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4. **INSTRUCTION IN MURDER CASE THAT CERTAIN FACTS WOULD NOT AMOUNT TO MORE THAN MANSLAUGHTER.** Where in a murder trial, in which the verdict was manslaughter, the court in its charge set forth the law bearing upon the case in all its possible phases, and also gave an instruction, that "if defendant and deceased were engaged in a violent struggle, in which deceased repeatedly struck defendant on the head with a champagne bottle, and that deceased made the first assault in retaliation of offensive and insulting language, such struggle and striking of defendant would be deemed sufficient provocation to excite an irresistible passion in a reasoning being; and if such passion was actually

excited in defendant, and no interval occurred sufficient for the voice of reason and humanity to be heard, but immediately, and without malice or revenge, and simply in obedience to such sudden violent impulse of passion, defendant stabbed and killed deceased, such killing would not amount to more than manslaughter"; and it was objected that the instruction led to the verdict of manslaughter: *Held*, that the objection was not valid, and that there was no error. *State v. Hutchinson*, 58.

2. **CHARGE THAT VERDICT EITHER WAY WILL BE CORRECT.** Where, in a murder case, the judge charged the jury, "Do simply that duty which naturally presents itself as you act under your oath and the law and the testimony before you; and you cannot greatly err, whatever may be your verdict": *Held*, that this amounted to telling the jury that whether they convicted or acquitted, their verdict would be substantially correct; and was fatal error. *State v. Ah Tong*, 148.
3. **CHARGE INTIMATING JUDGE'S OPINION ON FACTS.** A judge in a criminal case has no right to intimate an opinion upon the facts either directly or by innuendo; and the effect of such an opinion expressed or indicated cannot be obviated by announcing the jury's independence of him in all matters of fact. *State v. Ah Tong*, 148.
4. **INSTRUCTION REMOVING QUESTION OF FACT FROM JURY PROPERLY REFUSED.** Where the court in an insurance case refused to instruct the jury that if plaintiff failed to deliver to defendant an account of the destruction of the property insured as required by the policy, they should find for defendant: *Held*, properly refused; for the reason that it took from the jury the question whether defendant had not, as plaintiff claimed, waived such statement. *Gerhauser v. North British and M. Ins. Co.*, 174.
5. **INSTRUCTIONS—STRIKING OUT REITERATIONS.** It is no error to modify an instruction by striking out a portion of it, if such portion be merely a repetition of what is given in another part of the charge; it being sufficient if the whole series of instructions when read in connection correctly express the law as requested. *Gerhauser v. North British and M. Ins. Co.*, 174.
6. **SUBMITTING REJECTED PORTIONS OF INSTRUCTION ONLY PARTLY OBLITERATED.** Where an instruction was modified by rejecting a portion, and such rejection was indicated by passing through the rejected words the stroke of a pen, leaving them still legible; in which state the instruction was handed to the jury: *Held*, that unless the attention of the court had been called to the fact, and it had refused to allow the instruction to be re-written, no complaint of the jury having been misled thereby could be entertained. *Gerhauser v. North British and M. Ins. Co.*, 174.
7. **DIFFERENCE BETWEEN CIVIL AND CRIMINAL PRACTICE AS TO REFUSING INSTRUCTIONS.** The rule in criminal cases, that when an instruction is refused for the reason that it has already been given, the court should so inform the jury, does not apply in civil cases. *Gerhauser v. North British and M. Ins. Co.*, 174.

1. **REMARK OF JUDGE TO JURY IN CRIMINAL CASE TO "AGREE QUICKLY."** Where the judge in a criminal case made a remark to the jury that it was his earnest desire that they should agree quickly: *Held*, that though such remarks had better always be omitted, there was no intimation that the jury need not give the case the most deliberate and careful consideration, and that, as it could not be seen that the remark could result prejudicially to defendant, there was no error. *State v. Roderigas*, 328.
9. **EXPRESSION OF JUDGE'S OPINION AS TO FACTS IN RULINGS AS TO EVIDENCE.** The opinion of a judge in respect to a matter of fact in a criminal case can be as effectively conveyed to the jury by expressing it in their hearing while ruling upon an objection to evidence, as by embodying it in an instruction to them; and he has no more right to volunteer such an opinion in one case than in the other. *State v. Harkin*, 377.
10. **ATTEMPT TO CURE ERRONEOUS EXPRESSION OF OPINION AS TO FACTS.** Where a judge in the course of a murder trial, in overruling an objection to testimony tending to show that defendant had kicked deceased fatally in the breast, remarked, "that there was as much testimony that defendant had kicked deceased upon the chest as upon the face," and afterward took occasion to state to the jury that in making the remark he was simply ruling upon an objection to testimony, and addressing himself more directly to counsel, and that he did not wish to be understood as saying how much or how little testimony there was upon any particular point, and that the whole matter was for them to pass upon: *Held*, that the error of the remark, if curable at all, was not cured by the caution—there being no retraction of his opinion, but merely a disclaimer of opinion as to the absolute weight of such testimony. *State v. Harkin*, 377.
11. **CRIMINAL LAW—ORAL REMARKS OF JUDGE TO JURY — REQUEST TO AGREE.—** Where the judge, in a criminal trial, orally stated to the jury that, as the trial had occasioned great expense, and a large venire had been exhausted and much time taken up, and it was doubtful whether another jury could be procured, he would give an instruction upon the point on which they had been in doubt the night before, and it might aid them in making up a verdict; and he then read an instruction: *Held*, that the oral statement was in no sense a charge or instruction, and not open to objection for being oral; nor was it objectionable as calculated to encourage the jury to find an inconsiderate verdict. *State v. Jones and Nery*, 408.

TRIAL OF ACCESSORIES BEFORE THE FACT—CHARGE AS TO PRINCIPAL—see ACCESSORY, 1, 2.

CRIMINAL CHARGE—USE OF WORDS "VINDICATE THE LAW"—see CRIMINAL LAW, 4.

CHARGE THAT APPROXIMATION TO TRUTH IS SUFFICIENT—see CRIMINAL LAW 5, 6.

CRIMINAL LAW—CHARGE ASSUMING PROOF OF MATERIAL FACTS—see CRIMINAL LAW, 12, 18.

ERRORS OF INADVERTENCE IN CHARGE AS FATAL AS WILLFUL ONES—see ERROR.

RIGHT TO SPECIAL FINDINGS BY JURY—see FINDINGS, 3.

WRITTEN FINDINGS BY JURY MUST BE PROPERLY ASKED FOR—see JURY, 2.

BOUNDARIES OF MINING CLAIMS—CHARGE APT TO MISLEAD—see MINES, 3.

INSTRUCTIONS SHOULD BE BASED UPON POINTS INVOLVED—see MINES, 6.

CLAIMS.

ALLOWANCE OF CLAIMS AGAINST COUNTIES—see COUNTIES, 2, 3.

CLAIMS FOR STATE CAPITOL INDEBTEDNESS—see EXAMINERS, 1, 2.

LIMITATION OF TIME TO PRESENT CLAIMS—MATERIALITY—see TIME.

CLERK.

INADMISSIBLE RETURN BY CLERK TO CERTIORARI—see CERTIORARI, 1.

COMMON LAW.

ADOPTION OF THE COMMON LAW. The territorial statute adopting the common law of England (Stats. 1861, 1) was adopted by the state constitution (Con. Schedule, Sec. 2). *Vansickle v. Haines*, 249.

CONSTITUTION.

1. **CONSTRUCTION OF ARTICLE IV, SECTION 21, OF CONSTITUTION.** It appearing that the constitutional provision against special and local legislation was borrowed from Indiana, and that previous thereto the Indiana courts had decided that a special or local law could not be enacted when a general one could be made applicable, and that a general law could be made applicable to the subject of the removal of county seats: *Held*, that the construction of the Indiana courts as to the meaning of the provision was adopted, but not their application of it to the subject of county seats. *Hess v. Pegg*, 23.
2. **CONSTRUCTION OF ARTICLE II, SECTION 6, OF CONSTITUTION.** Under Article II, Section 6, of the constitution, the legislature can prescribe what oath or oaths may be necessary as a test of electoral qualification, but it cannot impede or trammel the right of suffrage by adding new qualifications. *Clayton v. Harris*, 64.

8. **CONSTRUCTION OF ARTICLE IV, SECTION 20, OF THE CONSTITUTION.** Under the constitutional provision against the passage of local or special laws regulating county or township business, (Art. IV, Sec. 20): *Held*, that a special act, auditing and allowing a preëxisting claim against a county, appointing the mode and manner of its payment, directing the drawing of county warrants and fixing the rate of interest they should bear, was unconstitutional. *Williams v. Bidleman*, 68.
- . **LOCAL MANAGEMENT OF LOCAL AFFAIRS.** The policy of the constitution is local management of local affairs, regulated by general laws of uniform application throughout the State. *Williams v. Bidleman*, 68.
- . **CONSTITUTIONALITY OF STATE STAMP ACT.** The enactment of the statute imposing a revenue stamp upon bills of exchange drawn in this state upon another state, (Stats. 1871, 142) was a legitimate exercise by the state of its inherent and unsundered power of taxation. *Ex parte James P. Martin*, 140.
- . **CONSTITUTIONAL RIGHT OF ACCUSED TO PROPER INDICTMENT.** A defendant in a criminal action is entitled under the constitution to have the essential and material facts charged against him found by a grand jury. *State v. O'Flaherty*, 153.
- . **STATUTE WAIVING ESCHEAT NOT UNCONSTITUTIONAL.** The state, through the legislature, may waive the right to insist upon a technical informality in the execution of a will as against the just and equitable claims of the legatee; in other words, it may waive its rights to an escheat by ordering that an unattested will may be admitted to probate; and there is nothing in the constitutional provision concerning the school fund, Art. XI, Sec. 3, to prevent it. *Matter of Estate of Henry Sticknoth*, 223.
- . **STATUTE WAVING ESCHEAT NOT OPPOSED TO CONSTITUTION, ART. IV, SECTION 21.** The statute providing for the admission to probate of the unattested will of Henry Sticknoth (Stats. 1871, 129) is not objectionable as a special act in a case where a general law could be made applicable. *Matter of Estate of Henry Sticknoth*, 223.
- . **EXCLUSION OF NEGROES FROM PUBLIC SCHOOLS UNCONSTITUTIONAL.** Section 50 of the school law, (Stats. 1867, 95) in so far as it excludes negroes from the public schools, is unconstitutional. *State ex rel. Stoutmeyer v. Duffy*, 342.
0. **DISCHARGE OF SUPPLEMENTAL ASSESSMENT BY COUNTY COMMISSIONERS NOT UNCONSTITUTIONAL.** The exercise of the functions of the board of county commissioners in the discharge of a supplemental assessment under the statute providing therefor (Stats. 1867, 111) is not obnoxious to the constitutional division of powers. (Const. Art. III.) *State ex rel. Mason v. Ormsby County Commissioners*, 392.
1. **INTERPRETATION OF ARTICLE IV, SECTION 26, OF CONSTITUTION.** The constitutional provision relating to county commissioners seems to have been

adopted from California ; and it may be lawfully presumed to have been taken with the judicial interpretation attached to it in that state. *State ex rel. Mason v. Ormsby County Commissioners*, 392.

12. **AMENDMENT VI OF U. S. CONSTITUTION NOT APPLICABLE TO STATE TRIBUNALS.** The provision of Amendment VI of the United States Constitution, that accused persons are entitled to be confronted with the witnesses against them, is applicable only in the federal courts, and is in no wise a restriction upon the powers of the states, or applicable to state courts. *State v. Jones and Nery*, 408.

ADOPTION OF THE COMMON LAW BY THE CONSTITUTION—see **COMMON LAW**.

CONSTRUCTION OF BORROWED CLAUSES OF CONSTITUTION—see **CONSTRUCTION**, 4.

LEGISLATIVE POWER OVER COUNTIES AND COUNTY SEATS—see **COUNTIES**, 1.

REGISTRY LAW ALLEGIANCE OATH UNCONSTITUTIONAL—see **ELECTIONS**, 1.

CONSTITUTIONAL PROVISION AS TO ESCHEATS—see **ESCHEAT**, 2.

CONSTITUTIONALITY OF STATUTE ALLOWING GOLD COIN JUDGMENT IN TRESPASS CASE—see **GOLD COIN**.

ONLY INTERESTED PARTIES CAN COMPLAIN OF VIOLATION OF VESTED RIGHTS—see **PRACTICE**, 4.

CONSTRUCTION OF LIMITATION OF TIME IN STATUTE TO PRESENT CLAIMS—see **TIME**.

WASHOE COUNTY SEAT ACT CONSTITUTIONAL—see **WASHOE COUNTY**.

CONSTRUCTION.

1. **CONSTRUCTION OF STATUTES—LEGISLATIVE INTENT.** The intention of the legislature controls the courts, not only in the construction of an act, but also in determining whether a former law is repealed or not ; and when such intention is manifest it is to be carried out, no matter how awkwardly expressed or indicated. *Thorpe v. Schooling*, 15.
2. **STATUTORY CONSTRUCTION—TITLE OF ACT.** The title of a statute may be considered for the purposes of construction, and especially so when the title is referred to in the body of the act. *Torreyson v. Board of Examiners*, 19.
3. **ALL PARTS OF STATUTES TO BE GIVEN EFFECT IF POSSIBLE.** No part of a statute should be rendered nugatory, nor any language be turned to mere surplusage, if such consequences can properly be avoided. *Torreyson v. Board of Examiners*, 19.
4. **CONSTRUCTION OF BORROWED CLAUSES OF CONSTITUTION.** Where a constitutional provision has been borrowed from another state, after its meaning has been

judicially determined by such state, the construction so put upon it is deemed adopted with the language. *Hess v. Pegg*, 23.

- . **STATUTORY CONSTRUCTION—WHAT IS DIRECTORY.** No specific requirement of a statute should be dispensed with or held merely directory, unless it is clearly manifest that the legislature did not deem a compliance with it material, or unless it appears to have been prescribed simply as a matter of form. *Corbett v. Bradley*, 106.
 - . **PRINCIPLE OF DECISIONS AS TO WHAT IS MERELY DIRECTORY.** When any requirement of a statute is held to be directory and not material to be followed, it is upon the assumption that the legislature itself so considered it, and did not intend to make the right conferred dependent upon a compliance with the form prescribed for securing it. *Corbett v. Bradley*, 106.
 - . **CONSTRUCTION OF POLICY—DOUBTS IN FAVOR OF ASSURED.** If on the face of a policy of insurance there is, in the language used or its effect, any room for construction or doubt, the benefit of the doubt must be given to the assured. *Gerhauser v. North British and M. Ins. Co.*, 174.
 - . **INTERPRETATION OF LANGUAGE OF POLICIES.** In the construction of policies of insurance, such meaning should be given to the language used as plain men usually attach to it. *Gerhauser v. North British and M. Ins. Co.*, 174.
- CONSTRUCTION OF GRANTS OF GOVERNMENT.** Grants by the government must always be construed most favorably to the government; they pass nothing by implication. *Vansickle v. Haines*, 249.
- D. **CONSTRUCTION OF FRANCHISE GRANTS.** Any ambiguity in the terms of the grant of a franchise must operate against the grantee and in favor of the public. *Lake v. Virginia and Truckee R. R. Co.*, 294.
 - L. **CONSTRUCTION OF STATUTE RELATING TO SUPPLEMENTAL ASSESSMENTS.** The language of the act of 1867, providing for supplemental assessments, (Stats. 1867, 111) does not limit the power of the board of county commissioners in reference to the modifying, equalizing or discharging of supplemental assessments; but is evidently intended to enlarge it in distinction to the restrictions imposed on the commissioners sitting as a board of equalization under the general revenue law. *State ex rel. Mason v. Ormsby Co. Commissioners*, 392.

CONSTRUCTION OF STATUTES RELATING TO STATE CAPITOL INDEBTEDNESS — see CAPITOL.

CONSTRUCTION OF CONSTITUTIONAL PROVISIONS—see CONSTITUTION, 1, 2, 3, 8, 10, 11.

DISCONNECTED MATTERS DO NOT FORM ONE TRANSACTION—see CONTRACT, 6.

CONSTRUCTION OF CONSTITUTIONAL PROVISION AS TO ESCHEAT—see ESCHEAT, 2.

CONSTRUCTION OF PLEADINGS TO BE LIBERAL—see PLEADING, 3.

PRESUMPTION WHERE BOTH GENERAL AND SPECIAL STATUTES AS TO REMOVING A COUNTY SEAT—see PRESUMPTION, 1.

REPEAL OF STATUTE BY REVISION OF SUBJECT MATTER—see STATUTES, 1

THE LATEST EXPRESSION OF LEGISLATIVE WILL THE LAW—see STATUTES, 5.

CONTINUANCE.

AFFIDAVIT FOR CONTINUANCE—MATERIAL FACTS TO BE STATED POSITIVELY. Where, on motion for continuance in a criminal case, on account of absence of a material witness, defendant made an affidavit to the effect, among other things, that a subpoena had been issued in due time for him and placed in the sheriff's hands; that the sheriff had returned it "not found in the county"; that the witness resided at a certain place in the county; and that affiant was informed by his counsel and believed that the sheriff had been at the time told the place of such residence: *Held*, that the fact of the sheriff having been so informed should have been shown positively, and not upon mere information and belief; and that, in the absence of such positive statement, and no good reason shown why the affidavit of the attorney or sheriff could not be procured, a refusal of the motion was no error. *State v. O'Flaherty*, 153.

PRACTICE ON REFUSAL OF CONTINUANCE—see PRACTICE, 3.

CONTRACTS.

1. **NO RATIFICATION OF UNAUTHORIZED CONTRACT BY PARTIAL ALLOWANCE.** Where attorneys presented a claim for \$5,000, for services rendered a county, to the county commissioners, who allowed it only to the extent of \$400; and there was no pretense of any direct contract with such commissioners, and no proof that they knew the claim was made upon an alleged contract of employment for the county by the district attorney, and no proof of any contract with the district attorney: *Held*, that such partial allowance would not constitute a ratification of any such contract. *Clarke v. Lyon County*, 75.
2. **NO RATIFICATION OF CONTRACT WITHOUT KNOWLEDGE OF IT.** No act will amount to a ratification of an unauthorized contract, unless the person charged with the ratification is cognizant of all the material features of it; and especially must he have a knowledge of the existence or execution of the contract itself. *Clarke v. Lyon County*, 75.
3. **RATIFICATION EQUIVALENT TO EXECUTION OF CONTRACT.** As ratification is after all but the execution of a contract on the part of the person ratifying, such ratification, to be effective, must be done understandingly. *Clarke v. Lyon County*, 75.
4. **DIFFERENT INSTRUMENTS MAKING ONE CONTRACT.** If two instruments bearing on the same subject matter are executed together as one transaction, they constitute but one contract. *Bowker v. Goodwin*, 135.

1. **WRITTEN INSURANCE CONTRACT VITIATED BY PAROL—MATERIAL MISREPRESENTATION—BURDEN OF PROOF.** Though as an ordinary rule, written contracts cannot be controlled by antecedent or cotemporaneous statements not embraced in the writing, in the case of a policy of insurance a recovery may be prevented by proof of verbal misrepresentations which, though undesigned, were material to the risk ; but the burden of proof is on defendant to show the misrepresentation, and that it was material. *Gerhauser v. North British and M. Ins. Co.*, 174.
1. **DISCONNECTED MATTERS DO NOT FORM ONE TRANSACTION.** Where the owners of a mill-site and water privilege conveyed a portion thereof, and afterwards such owners and grantees entered into an agreement to erect and keep in repair a dam and flume for conducting water to their mills ; and it did not appear that the agreement was a part of the conveyance or contemplated at the time : *Held*, that in no sense could the two papers be considered one instrument, or connected together. *Wheeler v. Schad*, 204.
- **NO RECOVERY ON CONTRACT NOT COVERED BY PLEADINGS.** In an action to recover half the cost of certain improvements made by plaintiff for the benefit of both parties, where the complaint based the assumpsit exclusively upon a written contract by the terms of which it was claimed defendant was bound as assignee : *Held*, that no recovery could be had upon a direct personal promise. *Wheeler v. Schad*, 204.
- **COVENANT—WHEN CONSIDERATION STATED NOT TO BE VARIED BY PAROL.** Where in a suit for damages under a bond, which called in terms for a large sum as “liquidated damages” but was in law a penalty to secure the payment of a smaller sum, and there was no ambiguity in the instrument : *Held*, that the agreement was fully embraced in the writing, and that plaintiff could not be allowed to show by parol that the consideration for the agreement was of greater value than the sum so secured to be paid. *Morris v. McCoy*, 399.
- ACTION ON CONTRACT BY PARTY HAVING INTEREST IN ITS PERFORMANCE—see ACTION.**
- CONTRACTS FOR EMPLOYMENT OF COUNSEL FOR COUNTY BUSINESS—see COUNTIES, 4, 5.**
- COVENANT TO BUILD DAM AND FLUME NOT RUNNING WITH MILL-SITE—see COVENANT, 1, 2, 3.**
- “LIQUIDATED DAMAGES” WHEN HELD TO BE MERE “PENALTY”—see DAMAGES, 3.**
- INSURANCE—VALID CONTRACT BEFORE ACTUAL DELIVERY OF POLICY—see INSURANCE, 1.**
- AGREEMENT AS TO WHAT SHALL BE WARRANTY IN STATEMENT BY INSURED—see INSURANCE, 8.**

PAROL ADOPTION OF WRITTEN CONTRACT—STATUTE OF LIMITATIONS—see LIMITATIONS.

"NEW MATTER" IN ACTION ON CONTRACT—see PLEADING, 8.

BURDEN OF PROOF ON PLAINTIFF RELYING ON RATIFICATION—see RATIFICATION.

ONE STAMP WHEN TWO INSTRUMENTS CONSTITUTE ONE TRANSACTION—see STAMPS, 3.

CONVERSION.

MEASURE OF DAMAGES ON CONVERSION OF STOCKS—see DAMAGES, 1.

FAILURE TO DENY DEMAND AND REFUSAL NOT NECESSARILY ADMISSION OF CONVERSION—see EXECUTORS AND ADMINISTRATORS, 6.

CORPORATIONS.

MINING CLAIMS NOT TO BE REDUCED BY MERE DECLARATIONS OF SUPERINTENDENT OR PRESIDENT—see MINES, 4, 5.

COUNTIES.

1. **LEGISLATIVE POWER OVER COUNTIES AND COUNTY SEATS.** The legislature has full and complete control of the entire subject of counties and county seats, save where prohibited by constitutional provisions. *Hess v. Pegg*, 23.
2. **LAWS IN REFERENCE TO COUNTY LIABILITIES.** A law fixing the liability of a county is a condition precedent to the exaction of payment from the county. *Williams v. Bidleman*, 68.
3. **ALLOWANCE OF CLAIMS AGAINST COUNTIES.** The fact that the board of commissioners of a county has no power under the general law to examine or allow any account against the county except such as is legally chargeable against it, does not authorize the passage of a special law directing the allowance and payment of an account which could not be allowed under the general law. *Williams v. Bidleman*, 68.
4. **EMPLOYMENT OF EXTRA COUNSEL FOR COUNTY BUSINESS BY DISTRICT ATTORNEY.** In a suit by attorneys against a county, for services rendered such county, on an alleged employment made by the district attorney—the claim being based upon an alleged ratification by the county commissioners of the contract of employment—defendant asked an instruction, that, if plaintiffs presented their claim for \$5,000 to the commissioners, and they approved it for \$400 only of such claim, such approval of part did not in itself alone constitute a ratification of any agreement or contract made by the district attorney; and such instruction was refused: *Held*, error. *Clarke v. Lyon County*, 75.

EMPLOYMENT OF ATTORNEYS BY COUNTIES. County commissioners have authority to employ attorneys to protect the interests of their county in litigation affecting it, and to bind their county by contracts for the payment of such attorneys' fees. *Ellis v. Washoe County*, 291.

LOCAL MANAGEMENT OF LOCAL AFFAIRS OF COUNTIES—see CONSTITUTION, 4.

PAYMENT OF JURORS' FEES BY COUNTIES—PEREMPTORY STATUTE—see FEES.

APPLICATION OF STATUTE REGULATING COUNTY BUSINESS—see LEGISLATURE, 8.

WHAT PERSONAL PROPERTY IN COUNTY PROPERLY ASSESSABLE THEREIN—see TAXES, 7.

GENERAL INTEREST OF PEOPLE OF COUNTY IN QUESTION INVOLVED NO GROUND FOR CHANGE OF VENUE—see VENUE.

COUNTY COMMISSIONERS.

POWER OF COUNTY COMMISSIONERS TO EMPLOY ATTORNEYS. Section 8, subdivision 12, of the statute concerning county commissioners, (Stats. 1871, 48) giving them power "to control the prosecution or defense of all suits to which the county is a party," embraces the power to employ and pay counsel (besides the district attorney) not only in suits in which the county is a party on the record, but in those in which it may be a party in interest. *Ellis v. Washoe County*, 291.

POWER OF COUNTY COMMISSIONERS OVER SUPPLEMENTAL ASSESSMENTS. Under the act of 1867, (Stats. 1867, 111) the board of county commissioners are empowered to modify, equalize or discharge any supplemental assessments therein provided for, upon proper application of the party in interest. *State ex rel. Mason v. Ormsby County Commissioners*, 392.

POWERS OF COUNTY COMMISSIONERS. The duties of county commissioners are various and manifold; sometimes judicial, and at others legislative and executive; in matters relating to the police and fiscal regulations of counties, they are such as may be enjoined by law, without any nice examination into the character of the powers conferred. *State ex rel. Mason v. Ormsby County Commissioners*, 392.

CONSTRUCTION OF CONSTITUTIONAL PROVISION AS TO COUNTY COMMISSIONERS—see CONSTITUTION, 11.

NO RATIFICATION OF UNAUTHORIZED CONTRACT BY PARTIAL ALLOWANCE THEREFOR BY COUNTY COMMISSIONERS—see CONTRACT, 1.

ALLOWANCE OF CLAIMS AGAINST COUNTIES—see COUNTIES, 3, 4.

JURORS' FEES NOT TO BE PASSED UPON BY COUNTY COMMISSIONERS—see STATUTES, 5.

POWERS OF COUNTY COMMISSIONERS TO EQUALIZE OR DISCHARGE SUPPLEMENTAL ASSESSMENTS—see TAXES, 2, 3, 8, 9.

COUNTY SEATS.

CONSTITUTION DOES NOT PROHIBIT SPECIAL LEGISLATION AS TO REMOVAL OF A COUNTY SEAT—see CONSTITUTION, 1.

LEGISLATIVE POWER OVER COUNTY SEATS—see COUNTIES, 1.

WASHOE COUNTY SEAT ACT CONSTITUTIONAL—see WASHOE COUNTY.

COVENANT.

1. **COVENANT TO BUILD DAM AND FLUME NOT RUNNING WITH MILL-SITE.** Where the owners of a mill-site and water privilege conveyed a portion thereof, and six days afterwards such owners and grantees entered into a contract to erect and keep in repair at joint expense a dam and flume for conducting water to their respective mills; and subsequently the mill and mill-site of the grantees were sold out on judgment against them: *Held*, that the contract of the grantees to contribute to keep the dam and flume in repair was not a covenant running with the mill-site, and that the purchaser at sheriff's sale was not by his mere purchase liable for any portion of such repairs. *Wheeler v. Schad*, 204.
2. **COVENANT RUNNING WITH LAND HOW CREATED.** A covenant to run with land must relate to and concern the land; and if it imposes a burden, it can only be created where there is a privity of estate between the covenantor and covenantee. *Wheeler v. Schad*, 204.
3. **COVENANT RUNNING WITH LAND ONLY MADE IN FAVOR OF ONE INTERESTED IN THE LAND.** A covenant real is and can only be incident to land; it cannot pass independent of it; it adheres to and is maintained by it; it is in fact a legal parasite; hence it follows that the person in whose favor it is made must have an interest in the land charged with it. *Wheeler v. Schad*, 204.
4. **COVENANT FOR PERFORMANCE OF VARIOUS ACTS—WHEN STIPULATED DAMAGES MERE PENALTY.** Where a covenant is such that it secures the performance or omission of various acts, some of which may not be readily measurable by any exact pecuniary standard, together with others in respect of which the damages on the breach of the covenant are certain or readily ascertainable by a jury, any sum therein agreed upon as damages in case of breach will always be held a mere penalty. *Morris v. McCoy*, 899.

COVENANT BINDING ON ASSIGNEE—see ASSIGNMENT.

COVENANT—WHEN CONSIDERATION STATED NOT TO BE VARIED BY PAROL—see CONTRACT, 8.

COVENANT TO PAY LIQUIDATED DAMAGES—WHEN PAROL EVIDENCE OF SITUATION OF PARTIES ALLOWABLE—see EVIDENCE, 14.

CRIMINAL LAW.

1. **CRIMINAL LAW—RECOMMENDATION BY JURY TO FULL EXTENT OF PUNISHMENT.** Where the jury in a criminal case rendered a verdict for manslaughter, and recommended that defendant should receive the full extent of punishment allowed by law for that crime; and it was objected that such verdict showed on its face that the jury was prejudiced to defendant's injury: *Held*, that such recommendation did no injury, unless it could be shown that the court was influenced thereby. *State v. Hutchinson*, 58.
2. **CRIMINAL LAW—TESTIMONY IN ABSENCE OF JUROR.** Where a portion of the testimony of a witness for prosecution in a criminal case was given during the absence of a juror, but it appeared that such testimony was immaterial and that it was repeated to the twelve jurors as soon as the court's attention was called to the fact: *Held*, that the irregularity could not operate to defendant's detriment, and was not sufficient to reverse the judgment. *State v. Parsons*, 57.
3. **INDICTMENT FOR BURGLARY CHARGING ALSO LARCENY.** An indictment for burglary with intent to steal certain goods, which after stating the burglary goes on to allege the stealing of the goods, is not objectionable as charging two separate and distinct offences. *State v. Ah Sam and Ah See*, 127.
4. **CRIMINAL CHARGE—USE OF WORDS "VINDICATE THE LAW."** Where, in a murder case, the judge, after giving the statutory definition of the crime, used the following language: "Such is the law which you as jurors are called upon to vindicate," &c.: *Held*, that, though the instruction might have been only meant to enjoin the jury to assert and maintain the law, it would have been better to have told the jury so, and still better to have omitted that portion of the charge altogether. *State v. Ah Tong*, 148.
5. **CHARGE THAT APPROXIMATION TO TRUTH IS SUFFICIENT.** An instruction in a criminal case that an approximation to the truth by the jury would be all sufficient, and that their duty would be fulfilled by the avoidance of any very wide departure from a correct verdict, is objectionable. *State v. Ah Tong*, 148.
6. **RIGHTS OF ACCUSED TO JURY'S DELIBERATE ATTENTION.** A defendant in a criminal case has the right to the deliberate, independent, voluntary and unbiased judgment of the jury upon the truth of his theory or hypothesis of the case, without having the force of his position weakened by an instruction or intimation that even if they convict him they will not greatly err. *State v. Ah Tong*, 148.
7. **ASSAULT WITH INTENT TO MURDER—SUFFICIENCY OF INDICTMENT.** Where an indictment charged that on a certain day, defendant, without authority of law and with malice aforethought, did shoot at one James Norton with a pistol

loaded with powder and leaden bullets with intent to kill him, &c.: *Held*, that the technical word "assault" should have been employed, and an intent to murder stated; but the statutory form of indictment having been followed and no objection before judgment made, the indictment should be held sufficient. *State v. O'Flaherty*, 153.

8. **CRIMINAL LAW—OBJECTION THAT INDICTMENT WAS NOT FOUND BY PROPER GRAND JURY.** An objection to an indictment that it does not show that it was found by a grand jury having the proper authority, must be raised on motion to set it aside under Section 275 of the criminal practice act, or taken by special demurrer under Sections 286 and 287; and if not so raised or taken, it is waived by operation of Sections 277 and 294. *State v. Roderigas*, 328.
9. **SPECIAL POINT NOT TO BE RAISED UNDER GENERAL DEMURRER TO INDICTMENT.** The point that an indictment fails to show that it was found by a proper grand jury, cannot be raised under a general demurrer that the facts charged do not constitute a public offense. *State v. Roderigas*, 328.
10. **BATTERY OR INJURY NOT NECESSARY TO CONSTITUTE "ASSAULT WITH INTENT TO COMMIT MURDER."** In an indictment for "an assault with intent to commit murder" under section 47 of the criminal code, it is not necessary to allege a battery or injury of any kind. *State v. Roderigas*, 328.
11. **FACTS SUFFICIENT TO CONSTITUTE "ASSAULT WITH INTENT TO COMMIT MURDER"**
 , Where on a trial of Roderigas for assault with intent to murder Elsworth, it appeared that Elsworth and one Matias had gone to the house of Roderigas for the purpose of getting certain boards fastened to such house; that Roderigas had previously given them permission to come and take the boards; that while Matias was engaged in taking the boards from the house, Roderigas, with intent to shoot one or the other, shot Elsworth, who stood some distance off; and it did not appear that the permission to take the boards had been retracted: *Held*, that the facts were clearly sufficient to justify a conviction of the crime charged. *State v. Roderigas*, 328.
12. **CRIMINAL LAW—CHARGE ASSUMING PROOF OF MATERIAL FACTS.** Where in a murder case the court instructed the jury that, "In order to make a killing under such circumstances as has been proven justifiable homicide, it must appear that the party killing had retreated as far as he safely could at the time, and in good faith declined all further contest, and was compelled to kill his adversary in order to save himself from death or great bodily harm, which to a reasonable man would appear imminent": *Held*, that this was substantially saying to the jury that defendant was guilty either of murder or manslaughter, provided they were satisfied he did not retreat to the wall before he killed deceased—thus assuming the proof of all the other material and essential facts—and was clearly error. *State v. Kennedy*, 374.
13. **CRIMINAL LAW—CHARGING MATTER OF FACT.** In a murder case, where it appeared that defendant had kicked deceased in the face, but the prosecution contended that the killing was by a kick upon the breast, and offered testi-

mony to show bruises there; and the judge, in overruling objections to such testimony, remarked, in the hearing of the jury, "that there was as much testimony that defendant had kicked deceased upon the chest as upon the face": *Held*, error, as charging in respect to matter of fact. *State v. Harkin*, 377.

4. **CRIMINAL LAW—SEPARATION OF JURY.** Where, after the retirement of the jury in a criminal case, one of them left the jury room in company with the officer in charge, and visited his residence, about five hundred yards distant, and while passing through the street was spoken to by several persons; but there was no showing that anything was said in his hearing about the case, or that the officer had not been constantly at his side: *Held*, that as there was no evidence of any opportunity of tampering with the juror, there was no ground for setting aside the verdict. *State v. Jones and Nery*, 408.
5. **DEPOSITIONS IN CERTAIN CRIMINAL CASES.** The statute providing for depositions, under certain circumstances, in criminal cases, (Stats. 1867, 125, Secs. 151 and 171) is not amenable to the objection of being opposed to the United States constitution. *State v. Jones and Nery*, 408.
16. **OFFER OF DEPOSITIONS ON CRIMINAL TRIAL—PRELIMINARY PROOF.** When a deposition in a criminal case is offered in evidence, the offer should be accompanied with proof that it was taken in conformity with the statute; and if the proper objection be made, it should not be admitted without such preliminary proof. *State v. Jones and Nery*, 408.
17. **TRIAL OF ACCESSORY BEFORE THE FACT—PROOF OF GUILT OF PRINCIPAL NOT NECESSARY.** Under our statute it is not essential to the conviction of accessories before the fact, that the prosecution first prove the guilt of the principal; it is only necessary in such case to show that a crime has been committed, and that defendant, if present, aided and assisted, or if not present, advised or encouraged it. *State v. Jones and Nery*, 408.

TRIAL OF ACCESSORIES BEFORE THE FACT—CHARGE AS TO PRINCIPAL—see ACCESSORY, 1.

GRAND LARCENY—INSTRUCTION IGNORING THAT ACCESSORIES MAY BE GUILTY AS PRINCIPALS—see ACCESSORY, 2.

IRREGULARITY WHICH "MIGHT" BE PREJUDICIAL—see APPEAL, 2.

DEFECTS IN FORM OF INDICTMENT—OBJECTIONS TO BE MADE BELOW—see APPEAL, 9.

INSTRUCTION IN MURDER CASE THAT CERTAIN FACTS WOULD NOT AMOUNT TO MORE THAN MANSLAUGHTER—see CHARGE, 1.

CHARGE THAT VERDICT EITHER WAY WILL BE CORRECT—see CHARGE, 2.

CHARGE INTIMATING JUDGE'S OPINION ON FACTS—see CHARGE, 3.

REMARK OF JUDGE TO JURY TO "AGREE QUICKLY"—see CHARGE, 8.

ORAL REMARKS OF JUDGE TO JURY—REQUEST TO AGREE—see CHARGE, 11.

CONSTITUTIONAL RIGHT OF ACCUSED TO PROPER INDICTMENT—see CONSTITUTION, 6.

AFFIDAVIT FOR CONTINUANCE IN CRIMINAL CASE—see CONTINUANCE.

AMENDMENT VI OF THE U. S. CONSTITUTION NOT APPLICABLE TO STATE TRIBUNALS—see CONSTITUTION, 12.

DEMURER TO INDICTMENT—see INDICTMENT, 1, 6.

FORMS OF INDICTMENT—see INDICTMENT, 2, 7.

SUFFICIENCY OF ALLEGATIONS OF INDICTMENTS—see INDICTMENT, 3, 4, 5, 8.

OBJECTIONS FOR IRREGULARITY IN DRAWING TRIAL JURY MUST BE DISTINCTLY SHOWN—see JURY, 3.

PEREMPTORY CHALLENGE MAY BE REQUIRED DIRECTLY AFTER CHALLENGE FOR CAUSE—see JURY, 4.

SEPARATION OF JURY IN CHARGE OF OFFICER—see JURY, 5.

DRINKING LIQUOR BY JUROR—see JURY, 6.

JUSTIFIABLE HOMICIDE—RETREAT NOT NECESSARY AFTER THREATS AND HOSTILE DEMONSTRATIONS—see MURDER, 1.

PRACTICE ON REFUSAL OF CONTINUANCE—see PRACTICE, 3.

CROSS EXAMINATION.

PROVINCE OF CROSS EXAMINATION—see EVIDENCE, 11, 12, 13.

CURRENCY.

(See GOLD COIN.)

CUSTOM.

CUSTOM—INSUFFICIENCY OF PROOF. Where a custom was claimed to exist in relation to the machinery of saw-mills, that after being put up on timber land and the timber in the vicinity all sawed it was moved away to other land—the object of said alleged custom being to show that certain saw-mill machinery was not a fixture—and testimony was given by a single witness, that "saw-mills,

in this country, are built to saw the timber in their vicinity, and when the timber is sawed the machinery is moved away and the frame left, as a general thing;" and the court found that the machinery in question was a fixture: *Held*, that even if a custom could be proved by one witness, the finding against the alleged custom should not, under the testimony here, be disturbed. *Treadway v. Sharon*, 37.

DAMAGES.

MEASURE OF DAMAGES—FAILURE TO DELIVER STOCKS. The measure of damages in cases where there is a conversion of or failure to deliver a certain number of shares of stock having no peculiar value, is their market value either at the time of the conversion, when it should have been delivered, or at the time of trial, according to circumstances. *Bowker v. Goodwin*, 135.

MEASURE OF DAMAGES FOR LOSS BY NEGLIGENCE OF ADMINISTRATOR. Where money of an estate is lost by reason of such neglect of an administrator as he and his sureties are liable for, the sum lost constitutes the measure of damages. *McNabb v. Wixom*, 163.

"LIQUIDATED DAMAGES" WHEN HELD TO BE MERE "PENALTY." Where McCoy covenanted with Morris to pay certain debts owing by Morris, and, in case of failure, to pay to Morris \$10,000 as fixed, settled and liquidated damages: *Held*, that the sum so named was to be considered a penalty and not liquidated damages, and that in a suit on the covenant the recovery should be limited to the actual damage with legal interest. *Morris v. McCoy*, 399.

ACTION AGAINST STATE TREASURER'S SURETIES FOR "SPECIAL DEPOSITS"—MEASURE OF DAMAGES. In a suit against the sureties of a State Treasurer for the loss of "special deposits" paid in under the Act of 1867, (Stats. 1867, 166, sec. 5) the measure of damages is the amount of the deposits, unless a non-approval of the land locations for which the deposits were made, or an actual repayment to or release by the depositor, or something equivalent thereto, is shown in mitigation. *State v. Rhoades*, 434.

COVENANT FOR PERFORMANCE OF VARIOUS ACTS—WHEN STIPULATED DAMAGES MERE PENALTY—see COVENANT, 4.

COVENANT TO PAY LIQUIDATED DAMAGES—WHEN PAROL EVIDENCE OF SITUATION OF PARTIES ALLOWABLE—see EVIDENCE, 14.

GOLD COIN JUDGMENT FOR DAMAGES IN TRESPASS CASE—see GOLD COIN.

DAMAGES FOR REMOVAL AFTER PATENT OF FIXTURES ERECTED ON PUBLIC LAND—see PATENT, 1.

USE OF WATER PERCOLATING INTO ONE'S OWN SOIL NOT ACTIONABLE—see WATER RIGHTS, 5.

DECLARATIONS.

DECLARATIONS OF VENDOR AFTER SALE—see EVIDENCE, 8.

MINING CLAIMS NOT TO BE REDUCED BY MERE DECLARATIONS OF SUPERINTENDENT OR PRESIDENT—see MINES, 4, 5.

DEED.

ABSOLUTE CONVEYANCE MAY BE SHOWN MORTGAGE BY PAROL. The principle that a conveyance absolute upon its face, whether of real or personal property, can in equity be shown by parol proof to be a mortgage, or to have been given only as security, or to have been obtained by fraud, mistake or undue influence, is too well settled throughout the United States to be disturbed. *Saunders v. Stewart*, 200.

DEFAULT.

DEFAULT TO BE AVAILABLE MUST BE SHOWN BY RECORD—PRESUMPTION. Where an objection was made on appeal that the court below erred in denying plaintiff's motion to enter defendant's default and for judgment thereon; and there was nothing in the record to show that a default existed: *Held*, that a default could not be presumed against the action of the court, and that the want of showing in the record was a sufficient answer of itself to the objection. *Conley v. Chedic*, 336.

ALLOWANCE OF ANSWER AFTER TIME GENERALLY MATTER OF DISCRETION—see PRACTICE, 6.

DEFINITIONS.

1. MEANING OF ALLEGATION OF "FAIR VALUATION." Where, in answer to a tax suit, the defense was fraud in the assessment, and it was alleged that in a certain statement furnished the assessor, (but which was informal) the property was "set down as of the value of \$6,000 per mile, which was a fair valuation thereof, and so known and believed by the assessor": *Held*, that this amounted to an allegation that \$6,000 per mile was a just and fair value, and consequently that an assessment of \$15,000 per mile was excessive. *State v. Central Pacific Railroad Company*, 99.
2. DISTINCTION BETWEEN "SHOWING" AND "STATING" A FACT. There is a material distinction between "showing" a fact and "stating" it; in the former case, satisfactory proof may be required; in the latter, the mere recital of the fact is sufficient. *Meadow Valley Mining Co. v. Dodds*, 143.
3. DISTINCTION BETWEEN "EQUALIZING" AND "DISCHARGING" AN ASSESSMENT. The discharge of a supplemental assessment under the act of 1867, (Stats. 1867,

111) is entirely different from an equalization of the same. *State ex rel. Mason v. Ormsby County Commissioners*, 392.

DISMISSAL OF APPEAL "WITHOUT PREJUDICE"—see APPEAL, 6.

"AMONG THE FILES" SUPPOSED TO MEAN "FILED"—see FILING.

ALLEGATION OF "SHOOTING AT" PERSON WITH LOADED PISTOL—see INDICTMENT, 3.

"BRICK BUILDING" IN INSURANCE POLICY—see INSURANCE, 4, 5.

RULE AS TO WHAT SHALL BE "PENALTY" INSTEAD OF "LIQUIDATED DAMAGES"—see PENALTY.

"NEW MATTER" IN ACTION ON CONTRACT—see PLEADING, 8.

DISTINCTION BETWEEN POSSESSION OF MINING CLAIM AND POSSESSION OF FARMING LAND—see POSSESSION, 2.

MEANING OF "SETTLED" IN JUDGE'S CERTIFICATE TO STATEMENT—see PRACTICE ACT.

"LEGAL EXCUSE" OF RAILROAD TO FURNISH STATEMENT TO ASSESSOR—see RAILROADS, 1.

"RAILROAD BRIDGE" NOT AN ORDINARY BRIDGE—see RAILROADS, 4.

DELIVERY.

VALID INSURANCE CONTRACT BEFORE ACTUAL DELIVERY OF POLICY—see INSURANCE, 1.

DEMURRER.

SPECIAL POINT NOT TO BE RAISED UNDER GENERAL DEMURRER TO INDICTMENT—see CRIMINAL LAW, 9.

DEMURRER TO INDICTMENT—GROUNDS TO BE DISTINCTLY SPECIFIED—see INDICTMENT, 1.

INDICTMENT CHARGING MURDER ARGUMENTATIVELY AIDED ON GENERAL DEMURRER—see INDICTMENT, 6.

JOINT DEMURRER—SEPARATE ORDERS THEREON—see PLEADING, 4.

DEMURRER FOR MULTIFARIOUSNESS OF COMPLAINT—see PLEADING, 5.

DEPOSITION.

REQUISITES OF AFFIDAVIT TO TAKE DEPOSITION. The affidavit required to be made to authorize the taking of the deposition of a witness within the state,

has to show that the case is one of those mentioned in the statute, Practice Act, Sec. 407; but need not show that the summons has been served. *Lambert v. McFarland*, 159.

DEPOSITIONS IN CERTAIN CRIMINAL CASES—see CRIMINAL LAW, 15, 16.

OBJECTION TO DEPOSITION IN CRIMINAL CASE—see EXCEPTIONS, 1.

DISCRETION.

ALLOWANCE OF ANSWER AFTER TIME GENERALLY MATTER OF DISCRETION—see PRACTICE, 6.

NO DISCRETION OF BOARD OF EQUALIZATION WHEN NO STATEMENT FURNISHED BY RAILROAD—see TAXES, 3.

DISMISSAL.

DISMISSAL OF APPEAL—see APPEAL, 1, 6.

DISTRICT ATTORNEY.

EMPLOYMENT OF EXTRA COUNSEL FOR COUNTY BUSINESS BY DISTRICT ATTORNEY—see COUNTIES, 5.

ELECTIONS.

1. **REGISTRY ALLEGIANCE OATH UNCONSTITUTIONAL.** The oath required by Section of the registry law, (Stats. 1869, 141) "being in terms in addition to the qualifications of an elector, which now are or hereafter may be prescribed by law," cannot be regarded as "a test of electoral qualification" within the meaning of the constitution, (Act II, Sec. 6) and is therefore unconstitutional. *Clayton v. Harris*, 64.
2. **QUALIFICATIONS OF ELECTORS.** Where it appeared, in a contested election case, that the successful candidate had been elected by votes of persons whose names had been put on the official register, though they had not taken the oath prescribed by the registry law, (Stats. 1869, 141): *Held*, that the oath could not be required, and that the votes were properly received. *Clayton v. Harris*, 64.

CONSTRUCTION OF ART. II, SEC. 6 OF CONSTITUTION, AS TO TEST OF ELECTORAL QUALIFICATION—see CONSTITUTION, 2.

LEGISLATIVE POWER AS TO RIGHT OF SUFFRAGE—see LEGISLATURE, 2.

EQUALIZATION.

(See TAXES.)

EQUITY.

ABSOLUTE CONVEYANCE MAY BE SHOWN MORTGAGE BY PAROL—see DEED.

NO INJUNCTION TO RESTRAIN EXECUTION RESTRAINABLE BY SIMPLE MOTION—
see INJUNCTION, 1.

WHERE NO EVIDENCE TO SUSTAIN COMPLAINT, INJUNCTION DISSOLVED—see
INJUNCTION, 2.

MULTIFARIOUSNESS OF COMPLAINT—see PLEADING, 5.

ERROR.

ERRORS OF INADVERTENCE AS FATAL AS WILLFUL ONES. If a judge in the course of a criminal trial expresses in the hearing of the jury his opinion as to a matter of fact, the injury to defendant demands redress as imperatively in the case of a mere inadvertence on his part as in case of a willful evasion of the law. *State v. Harkin*, 377.

IRREGULARITY WHICH MIGHT BE PREJUDICIAL, IN CRIMINAL CASES—see AP-
PEAL, 2.

CLERICAL ERROR IN JUDGMENT MUST BE PRESENTED BELOW—see APPEAL,
13, 15.

ONLY PREJUDICIAL ERROR GROUND OF COMPLAINT—see APPEAL, 19.

CHARGE IN CRIMINAL CASE THAT VERDICT EITHER WAY WILL BE CORRECT—
see CHARGE, 2.

ATTEMPT TO CURE ERRONEOUS EXPRESSION OF OPINION AS TO FACTS—see
CHARGE, 10.

ADMISSION OF LEASE WITHOUT CALLING SUBSCRIBING WITNESS—see Evi-
DENCE, 1.

DENIAL OF RIGHT OF PROPER CROSS-EXAMINATION—see EVIDENCE, 11.

ESCHEAT.

STATUTE PREVENTING ESCHATEAT NO TRANSFER FROM SCHOOL FUND. The statute providing for the admission to probate of the unattested will of Henry Stick-

noth, deceased, (Stats. 1871, 129): *Held*, not to transfer to another fund, besides the school fund, the proceeds of an escheated estate. *Matter of Estate of Henry Sticknoth*, 223.

2. **CONSTITUTIONAL PROVISION AS TO ESCHEATS.** The constitution does not in terms vest in the school fund the title to escheats; it enjoins the application of certain resources to a specified purpose coupled with a prohibition against their diversion to other uses; but it does not prevent the legislature from determining what estates shall escheat, or from asserting or waiving a claim to derelict goods. *Matter of Estate of Henry Sticknoth*, 223.

PUBLIC ADMINISTRATOR HAS NO VESTED RIGHTS IN ESCHREATED ESTATES—
see **PUBLIC ADMINISTRATOR.**

EVIDENCE.

1. **EVIDENCE—SUBSCRIBING WITNESS.** Where a lease having a subscribing witness was admitted in evidence without calling such witness, or accounting for his absence, and the opposing party objected thereto: *Held*, error. *Kalmes v. Gerrish*, 81.
2. **MAKING PARTIES WITNESSES DOES NOT CHANGE RULES OF EVIDENCE.** The statute making parties competent witnesses does not abrogate the rule of evidence requiring a subscribing witness to a written instrument to be called, or his absence accounted for. *Kalmes v. Gerrish*, 81.
3. **TESTIMONY OF PARTY NOT BEST EVIDENCE WHERE SUBSCRIBING WITNESS.** Where a party desiring to introduce in evidence a written agreement signed by himself with a subscribing witness, took the stand and testified to its execution; but the opposite party objected to its admission on account of the subscribing witness not being called, nor his absence accounted for: *Held*, that such testimony, not being the best evidence, was not sufficient to authorize admission of the paper. *Kalmes v. Gerrish*, 81.
4. **EVIDENCE—VALUE OF DITCH STOCK.** Where plaintiff sued on a promissory note, which it appeared was to be cancelled on the delivery to him of certain stock in a ditch company, conveying water to his ranch; and a failure to deliver such stock being shown and its value involved, plaintiff offered to show "the value of the stock as taken in connection with his ranch": *Held*, that he could only be allowed to show its market value. *Bowker v. Goodwin*, 135.
5. **TESTIMONY ON FORMER TRIAL OF ABSENT WITNESS NOT ADMISSIBLE.** The rule that the testimony of a deceased witness given on a former trial of the same cause may be proved by secondary evidence and so be admitted, does not apply to the case of an absent witness. *Gerhauser v. North British and M. Ins. Co.*, 174.
6. **PAROL PROOF TO SHOW EQUITY SUPERIOR TO DEED.** The doctrine upon which parol proof is received to show a conveyance absolute in form to be a mort-

- gage or security for a loan, is that such evidence is received not to contradict the instrument, but to prove an equity superior to it. *Saunders v. Stewart*, 200.
1. **PROBATA NOT TO GO BEYOND ALLEGATA.** Proof is only admissible to establish the case made by the allegations of the pleading. *Wheeler v. Schad*, 204.
2. **DECLARATIONS OF VENDOR AFTER SALE.** The declarations of a vendor, made after the sale and not being a part of the transaction, are not admissible in evidence as against the vendee. *Perley v. Forman*, 309.
3. **CORRESPONDENCE OF "ALLEGATA" AND "PROBATA" ONLY REQUIRED IN ESSENTIAL PARTICULARS.** If the proofs in a case correspond with the allegations of the pleadings in respect to those facts and circumstances which are, in point of law, essential to the cause of action, it is sufficient. *James v. Goodenough*, 324.
10. **ADMISSION OF OBJECTIONABLE EVIDENCE THAT COULD NOT PREJUDICE.** Where, on appeal from a judgment for the recovery of money, the admission of parol proof of the contents of a certificate of deposit was assigned as error; and it appeared that it was unnecessary for plaintiff to rely upon or prove the contents of the certificate, and that the admission of the evidence could therefore not prejudice defendant; *Held*, no such error as would justify a reversal of the judgment. *Dougherty v. Wells, Fargo & Co.*, 368.
1. **DENIAL OF RIGHT OF PROPER CROSS-EXAMINATION ERROR.** Where on the trial of an action of assumpsit for work and labor, in which defendant pleaded a general denial and a special contract which had not been complied with, plaintiff testified as a witness on his own behalf to a contract different from that claimed by defendant, and to the performance of the work and labor and its value; whereupon defendant claimed the right to show, by cross-examination of plaintiff, the existence and terms of the special contract as he claimed it, which was denied on the ground that it was not proper cross-examination: *Held*, error. *Ferguson v. Rutherford*, 385.
2. **PROVINCE OF CROSS-EXAMINATION.** A defendant cannot on cross-examination of plaintiff draw out proof of "new matter"; but he may properly elicit all such particular facts as can tend to disprove the essential or ultimate facts in the plaintiff's case, which the direct examination tended to prove. *Ferguson v. Rutherford*, 385.
3. **CROSS-EXAMINATION MAY BE THOROUGH, SEARCHING AND EXHAUSTIVE.** So far as a party has a right to cross-examine, it is his privilege to make a thorough, searching and exhaustive examination. *Ferguson v. Rutherford*, 385.
4. **COVENANT TO PAY "LIQUIDATED DAMAGES"—WHEN PAROL EVIDENCE CONCERNING "SITUATION OF PARTIES" ALLOWABLE.** In a suit on a bond which provides for the performance of certain acts, and for the payment of a stipulated sum as damages in case of breach, parol evidence concerning the subject matter of the contract, so far as the situation of the parties is concerned, is only

admissible when it tends to show that the failure to perform the acts agreed upon has resulted in such damages as cannot be readily ascertained by any pecuniary standard. *Morris v. McCoy*, 899.

15. "OFFER OF PROOF" MUST SHOW WHAT PROOF IS OFFERED. Where, in a suit on a bond providing in terms for the payment of a large sum as liquidated damages, plaintiff offered to prove by parol "the situation of the parties and circumstances surrounding them," which offer was refused; and the bill of exceptions failed to show what particular situation or circumstances it was offered to prove, or whether they had any bearing on the contract: *Held*, that the offer was not sufficient, and was presumptively properly refused. *Morris v. McCoy*, 899.

ADMISSION OF IMPROPER TESTIMONY MUST BE AFFIRMATIVELY SHOWN ON APPEAL—see APPEAL, 11.

CERTIORARI—WEIGHT OF EVIDENCE NOT SUBJECT TO REVIEW—see CERTIORARI, 8.

WRITTEN INSURANCE CONTRACT VITIATED BY PAROL—MATERIAL MISREPRESENTATION—BURDEN OF PROOF—see CONTRACT, 5.

COVENANT—WHEN CONSIDERATION STATED NOT TO BE VARIED BY PAROL—see CONTRACT, 8.

CRIMINAL LAW—TESTIMONY IN ABSENCE OF JUROR—see CRIMINAL LAW, 2.

DEPOSITIONS IN CERTAIN CRIMINAL CASES—see CRIMINAL LAW, 15, 16.

CUSTOM—INSUFFICIENCY OF PROOF—see CUSTOM.

DISTINCTION BETWEEN "SHOWING" AND "STATING" A FACT—see DEFINITIONS, 2.

REQUISITES OF AFFIDAVIT TO TAKE DEPOSITIONS—see DEPOSITIONS.

INVENTORY NOT CONCLUSIVE EVIDENCE—see EXECUTORS AND ADMINISTRATORS, 4.

APPEAL—CONFLICT OF EVIDENCE AS TO COLLATERAL FACTS—see FINDINGS, 2.

OVER-ESTIMATE OF LOSS BY INSURED NOT CONCLUSIVE PROOF OF FRAUD—see FRAUD, 2.

PAROL ADOPTION OF WRITTEN CONTRACT—STATUTE OF LIMITATIONS—see LIMITATIONS.

MINING CLAIMS NOT TO BE REDUCED BY MERE DECLARATION OF SUPERINTENDENT OR PRESIDENT—see MINES, 4, 5.

EVIDENCE NOT OBJECTIONABLE BECAUSE COMPLAINT NOT PARTICULAR ENOUGH—see PLEADING, 9.

BURDEN OF PROOF ON PLAINTIFF RELYING ON RATIFICATION—see RATIFICATION.

EXAMINERS.

1. **CLAIMS FOR OUTSTANDING STATE CAPITOL INDEBTEDNESS.** Where a claim was duly presented under the act of 1871, providing for payment of outstanding indebtedness incurred in constructing the State capitol, (Stats. 1871, 154): *Held*, that the State examiners could not be required to examine or pass upon such claim until the completion and acceptance of the capitol. *Torreyson v. Board of Examiners*, 19.
2. **TIME TO PRESENT CLAIMS AGAINST CAVANAUGH FOR STATE CAPITOL CONSTRUCTION.** The limitation of thirty days time, within which to present claims against Peter Cavanaugh to the State board of examiners for services rendered and materials furnished for the state capitol, under the act of March 6th, 1871, (Stats. 1871, 154) was a material provision, and to authorize legal action by such board, had to be complied with. *Corbett v. Bradley*, 106.

EXCEPTIONS.

1. **OBJECTION TO DEPOSITION IN CRIMINAL CASE—WHEN TOO GENERAL.** Where a deposition in a criminal case was offered by the prosecution, and defendant objected that it was "incompetent evidence": *Held*, that such objection was too general to reach the point of failure to show that the deposition was taken in a case authorized by the statute. *State v. Jones and Nery*, 408.
2. **OBJECTIONS SHOULD BE SPECIFIC AND POINTED.** In criminal, as well as in civil cases, objections should be so specific that the attention of the court may be directed to the exact point, so that the objection may be obviated if it be of a character which admits of remedy. *State v. Jones and Nery*, 408.

APPEAL ON RULINGS BY BILL OF EXCEPTIONS—see APPEAL, 8.

INSUFFICIENT SHOWING IN BILL OF EXCEPTIONS—see APPEAL, 17.

OFFER OF PROOF MUST SHOW WHAT PROOF IS OFFERED—see EVIDENCE, 15.

OBJECTIONS FOR IRREGULARITY IN DRAWING JURY MUST BE DISTINCTLY SHOWN—see JURY, 3.

WANT OF AUTHENTICATION OF AFFIDAVITS FOR NEW TRIAL IN BILL OF EXCEPTIONS—see NEW TRIAL.

GROUND OF NONSUIT WAIVED, IF NOT URGED AT PROPER TIME—see NON-SUIT, 2.

PRACTICE ON REFUSAL OF CONTINUANCE—see PRACTICE, 8.

EXECUTION.

NO INJUNCTION TO RESTRAIN EXECUTION RESTRAINABLE BY SIMPLE MOTION—
see INJUNCTION, 1.

STAY OF EXECUTION ON APPEAL FROM JUSTICE—see JUSTICE OF THE PEACE.

EXECUTORS AND ADMINISTRATORS.

1. **DUTIES OF ADMINISTRATORS—CARE AND DILIGENCE.** Whenever an administrator does what the law prohibits, or fails to exercise reasonable care and diligence in the endeavor to do what the law enjoins, he and his sureties are liable for the damage consequent upon such act or omission. *McNabb v. Wixom*, 163.
2. **NEGLECT BY ADMINISTRATOR TO PAY OVER—LIABILITY FOR SUBSEQUENT LOSS.** If an administrator deposits money of an estate in a bank, and allows it to remain after the time when, if he had fulfilled his duty, it would have been distributed and in the hands of those entitled to it; and the bank fails and the money is lost, he and his sureties are liable therefor. *McNabb v. Wixom*, 163.
3. **TIME WITHIN WHICH ADMINISTRATORS TO ACCOUNT AND SETTLE.** Where a complaint against an administrator to recover money lost by his alleged neglect set out that it was his duty to render his account and settle and distribute on the expiration of a year from his appointment; that he was required by the demands of the heir to do so, but refused; and that seven months after the expiration of the year, the bank in which the money of the estate was deposited failed and the money was lost; *Held*, that it did not follow from the allegations that it was the administrator's duty to file his final account on the expiration of the year, or to have completed the distribution of the estate prior to the breaking of the bank. *McNabb v. Wixom*, 163.
4. **INVENTORY NOT CONCLUSIVE EVIDENCE.** An inventory filed by an administrator is not conclusive evidence either for or against him or his sureties, but is open to denial or explanation. *McNabb v. Wixom*, 163.
5. **ADMINISTRATOR BOUND BY DECREE OF SETTLEMENT.** A decree of settlement and distribution by a probate court is binding upon the administrator. *McNabb v. Wixom*, 163.
6. **NEGLECT OF ADMINISTRATOR TO ACCOUNT—DEMAND AND REFUSAL NOT NECESSARILY CONVERSION.** Where in a suit against an administrator and his sureties for moneys alleged to have been lost by failure and refusal of the administrator to file his final account and distribute the estate nineteen months after his appointment: *Held*, that the mere failure on the part of the defendants to deny the demand and refusal did not admit the conversion alleged. *McNabb v. Wixom*, 163.

MEASURE OF DAMAGES FOR LOSS BY NEGLECT OF ADMINISTRATOR—see DAMAGES, 2.

PUBLIC ADMINISTRATOR HAS NO VESTED RIGHT IN ESCHATEATED ESTATE—see PUBLIC ADMINISTRATOR.

ARE ADMINISTRATOR'S SURETIES BOUND BY DECREE OF SETTLEMENT?—see SURETIES, 1.

FEEES.

PAYMENT OF JURORS' FEES BY COUNTIES—PEREMPTORY STATUTE. The act of 1871, relating to the fees of jurors, and requiring the county auditor to draw his warrant on the county treasurer therefor, upon the certificate of the clerk of the court showing the amount due, (Stats. 1871, 56) is peremptory, and admits the exercise of no discretion on the part of the auditor. *Gillette v. Sharp*, 245.

FENCE.

FENCING NOT NECESSARY TO POSSESSION OF MINING CLAIM—see MINES, 2.

FILING.

"AMONG THE FILES" SUPPOSED TO MEAN "FILED." Where a clerk on return to a writ of certiorari certified that certain papers transcribed were true and correct copies of original papers "among the files" in his office: *Held*, that though the language was not as definite as it should be, it was sufficient to warrant the conclusion that such papers, being among the files, were themselves filed. *State ex rel. Thompson v. Board of Equalization of Washoe County*, 83.

ORDER OF JUDGE NOT FILED WITHIN HIS TERM OF OFFICE—see ORDER, 1.

ORDER MADE IN VACATION NOT VALID TILL DELIVERED FOR FILING—see ORDER, 2.

FINDINGS.

FINDINGS ON APPEAL. Findings of fact can only be taken to the Supreme Court by embodying them in a statement properly certified. *Bowker v. Goodwin*, 135.

FINDINGS—CONFLICT OF EVIDENCE AS TO COLLATERAL FACTS. The rule that the decision of a nisi prius court as to the sufficiency of proof will not be disturbed on appeal if there be a conflict of evidence, applies also to collateral facts. *Bowker v. Goodwin*, 135.

RIGHT TO SPECIAL FINDINGS BY JURY. Where special findings are asked for in due time the court should, if they are properly framed, always submit them to the jury. *Lambert v. McFarland*, 159.

NO CONSIDERATION ON APPEAL OF SUPPORT OF FINDINGS BY EVIDENCE, WHERE NO MOTION FOR NEW TRIAL—see APPEAL, 16, 18.

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FIXTURES.

FIXTURES—STEAM SAW-MILL, BOILER, ENGINE AND MACHINERY. Where a steam saw-mill, put upon land for the purpose of sawing up the timber upon it, had its foundation planted in the ground, and the engine, boiler and machinery were attached by bolts, belts, shafts and pipes to the frame work, which was built upon such foundation: *Held*, that such boiler, engine and machinery were fixtures. *Treadway v. Sharon*, 37.

2. **INTENTION NOT MATERIAL ON QUESTION OF FIXTURE OR NOT FIXTURE.** The fact that there is but a limited supply of timber on land upon which a steam saw-mill is put, and that it is the intention to remove the mill as soon as the timber is sawed, does not render the boiler, engine and machinery, otherwise fixtures, any the less such. *Treadway v. Sharon*, 37.

CUSTOM AS TO REMOVAL OF FIXTURES—INSUFFICIENCY OF PROOF—see CUSTOM.

PRINCIPLE OF TENANT'S RIGHT TO REMOVE FIXTURES—see LANDLORD AND TENANT.

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FRAUD IN TAX ASSESSMENTS—see ASSESSOR.

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GAMING.

1. **GAMING DEBTS NOT RECOVERABLE.** Money won at a public gaming table is not recoverable by action, in this State. *Scott v. Courtney*, 419.
2. **STATUTE LICENSING GAMING ONLY PROTECTS FROM CRIMINAL PROSECUTION.** The statute licensing gaming, (Stats. 1869, 119) does not change the old rule of law that money won at a public gaming table is not recoverable by action; it does not pretend to do more than protect the keeper of a public gaming house from criminal prosecution when a proper license is procured. *Scott v. Courtney*, 419.

GOLD COIN.

GOLD COIN JUDGMENT IN TRESPASS CASE. A judgment for gold coin in a trespass case is in conformity with the statute, (Stats. 1869, 228) which is constitutional. *Treadway v. Sharon*, 87.

GRAND JURY.

CONSTITUTIONAL RIGHT OF ACCUSED TO PROPER INDICTMENT BY A GRAND JURY—see CONSTITUTION, 6.

OBJECTION THAT INDICTMENT WAS NOT FOUND BY PROPER GRAND JURY—see CRIMINAL LAW, 8.

INDICTMENT.

1. **DEMURRER TO INDICTMENT—GROUNDS TO BE DISTINCTLY SPECIFIED.** It seems that a demurrer to an indictment "that it charges two separate and distinct offences" is objectionable, for the reason that it does not distinctly specify the grounds of objection as contemplated by the statute relating to criminal practice. Stats. 1861, 465, Sec. 287. *State v. Ah Sam and Ah See*, 127.
2. **FORM OF INDICTMENT—LEGISLATIVE POWER.** The power of the legislature to mold and fashion the form of an indictment is plenary; its substance, however, cannot be dispensed with. *State v. O'Flaherty*, 153.

3. **INDICTMENT CHARGING "SHOOTING AT" PERSON WITH LOADED PISTOL.** The words "shoot at" in an indictment imply that the person shot at was within range and distance; and where such "shooting at" a person with loaded pistol with intent to kill him is charged, it is permissible and necessary to prove the preparation and efficiency of the weapon, and other circumstances evidencing the ability of defendant. *State v. O'Flaherty*, 153.
4. **INFORMAL ALLEGATION OF INTENT TO MURDER.** An allegation in an indictment that a shooting at another person with a loaded pistol was "without authority of law and with malice aforethought, and with intent to kill him," is sufficient as an allegation of an intent to murder. *State v. O'Flaherty*, 153.
5. **INDICTMENT FOR ASSAULT WITH INTENT TO MURDER—CHARGING THE INTENT.** Where an indictment for an assault with intent to commit murder, under Section 47 of the criminal code, charged that defendant made an assault upon and shot Benjamin Elsworth with a gun "with intent him, the said Benjamin Elsworth, then and there feloniously, willfully and with malice aforethought to murder"; and it was objected that the facts were not set out showing an intent to murder: *Held*, that though "murder" might be a conclusion of law, the charging the intent to commit murder in the language of the statute was sufficient and proper. *State v. Roderigas*, 328.
6. **INDICTMENT CHARGING MURDER ARGUMENTATIVELY AIDED ON GENERAL DEMURRER.** Where in an indictment for murder, otherwise sufficient, it was substantially charged that defendant with malice aforethought struck deceased, thereby giving him a mortal wound, of which he died; and it was objected on general demurrer that the killing was not charged in positive and direct terms, but only argumentatively: *Held*, that though such an indictment might be defective on special objection, it was aided on general demurrer. *State v. Harkin*, 377.
7. **APPROVED FORMS OF INDICTMENT SHOULD BE ADHERED TO.** Though indictments in unusual language may be held sufficient, nothing is gained by a departure from approved precedents and forms. *State v. Harkin*, 377.
8. **INDICTMENT FOR GRAND LARCENY—ALLEGATION OF "WITHOUT AUTHORITY OF LAW."** Where an indictment for grand larceny alleged that defendant "feloniously did steal, take and lead away" the property, &c.: *Held*, that it was sufficient that the essential facts constituting the grand larceny were charged without a special allegation that such acts were "without authority of law," or any equivalent allegation. *State v. Jones and Nery*, 408.

DEFECTS OF FORM IN INDICTMENT—OBJECTIONS TO BE MADE BELOW—see APPEAL, 9.

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SPECIAL POINT NOT TO BE RAISED UNDER 'GENERAL DEMURRER TO INDICTMENT—see CRIMINAL LAW, 9.

BATTERY OR INJURY NOT NECESSARY TO CONSTITUTE ASSAULT WITH INTENT TO MURDER—see CRIMINAL LAW, 10.

INJUNCTION.

NO INJUNCTION TO RESTRAIN EXECUTION RESTRAINABLE BY SIMPLE MOTION. Where in an action for an injunction to restrain proceedings under a writ of execution issued by a justice of the peace in a certain tax suit commenced before him, and in which he had denied a motion to transfer to the district court, in accordance with section 33 of the act of March 9th, 1865, (Stats. 1864-5, 271) the complaint set forth the fact of an appeal from the judgment to the district court, but failed to allege any motion to either the justice or district court to stay the execution issued: *Held*, that as there was a plain, adequate and convenient remedy by simple motion in the original suit, no case for injunction was made out. *Hamer v. Kane*, 61.

WHERE NO EVIDENCE TO SUSTAIN COMPLAINT, INJUNCTION MUST BE DISSOLVED. Where the main allegations of a complaint for injunction, made upon information and belief, were fully and positively denied by the answer; and on motion to dissolve an injunction granted thereon without notice, the evidence entirely failed to sustain any of the material allegations of the complaint: *Held*, that a denial of such motion was too erroneous to admit of discussion. *Perley v. Forman*, 309.

NO INJUNCTION TO RESTRAIN USE OF WATER PERCOLATING INTO ONE'S OWN SOIL—see WATER RIGHTS, 5.

INSTRUCTIONS.

[See CHARGE.]

INSURANCE.

INSURANCE—VALID CONTRACT BEFORE ACTUAL DELIVERY OF POLICY. Where a wife made application to the agent of an insurance company for a policy on the life of her husband, and paid fifty dollars in accordance with the company's rules, which was to be applied to the first year's premium provided the risk should be taken; and in due time a policy was made out and forwarded to the

- agent for delivery; but before it was delivered the husband died, whereupon the agent, though tendered the balance of the premium, refused to deliver it: *Held*, that there was a valid contract for a policy; that upon the taking of the risk the fifty dollars became the property of the company, and the assured became entitled to the policy; and that such a contract was as available to sustain an action for the amount of the insurance as if the policy had been delivered. *Cooper v. Pacific Mutual Life Ins. Co.*, 116.
2. **INSURANCE—MISSTATEMENT OF FACT KNOWN TO INSURER.** Where the owner of a brick house, which he had kept insured, found it necessary on account of the settling of one of the walls to replace it temporarily with wood, which the insurance agent knew; and upon taking out a new policy the owner stated to the agent that the building was in good repair, but in the same conversation mentioned the fact of the wooden portion still remaining: *Held*, no such misrepresentation as would vitiate the policy. *Gerhauser v. North British and M. Ins. Co.*, 174.
 3. **DEPRECIATION OF PROPERTY INSURED.** Where furniture was insured at its full value with the knowledge of the insurer, and was kept insured for the same amount for a number of years, while by ordinary wear and tear and the condition of the building where it was, and which was known to the insurer, it depreciated in value: *Held*, that the mere fact that such furniture was worth less than the amount for which it was insured the last time did not vitiate the policy. *Gerhauser v. North British and M. Ins. Co.*, 174.
 4. **DESCRIPTION OF BUILDING IN POLICY NOT A WARRANTY.** Where a policy of insurance described the building insured as a "brick building," and it appeared that on account of the settling of one of the walls it was found necessary to put in temporarily a wooden substitution, which the insurer knew: *Held*, that the description in the policy was not a warranty that the building was entirely of brick. *Gerhauser v. North British and M. Ins. Co.*, 174.
 5. **MISDESCRIPTION USED BY INSURANCE AGENT.** Where on account of the settling of one of the walls of a brick building, it was found necessary to replace a portion of it temporarily with wood; and while in that condition it was insured, with full knowledge of its condition, as a "brick building": *Held*, that notwithstanding the wooden portion the building was not incorrectly called a brick building; but whether it was or not, the insurer could not take advantage of a misdescription knowingly used by its own agent, who drew the policy. *Gerhauser v. North British and M. Ins. Co.*, 174.
 6. **INSURANCE—WHAT FACTS MUST BE DISCLOSED.** Where the jury in an insurance case was instructed that the mere failure of the insured to disclose material facts known to the insurer or unknown to the insured would not prevent a recovery, and such instruction was pertinent to the testimony: *Held*, no error. *Gerhauser v. North British and M. Ins. Co.*, 174.
 7. **CONSIDERATIONS PERTINENT TO QUESTION OF MISREPRESENTATION.** Where in an insurance case the effect of an instruction, asked by defendant in reference to

alleged false representations by the insured, would have been to prevent the jury from drawing a conclusion from the whole conversation whether or not the insurer was sufficiently informed as to the true condition of the property : *Held*, properly refused. *Gerhauser v. North British and M. Ins. Co.*, 174.

1. **AGREEMENT AS TO WHAT SHALL BE MATERIAL REPRESENTATION.** Parties to a contract of insurance may decide for themselves what facts or representations shall be deemed material, either by converting the representations into a warranty or stipulating as to their materiality ; and when they have so agreed, the agreement precludes all inquiry upon the subject. *Gerhauser v. North British and M. Ins. Co.*, 174.

CONSTRUCTION OF POLICY—DOUBTS IN FAVOR OF ASSURED—see CONSTRUCTION, 7.

INTERPRETATION OF LANGUAGE OF POLICIES—see CONSTRUCTION, 8.

WRITTEN INSURANCE CONTRACT VITIATED BY PAROL—MATERIAL MISREPRESENTATION—BURDEN OF PROOF—see CONTRACT, 5.

WHAT FALSE STATEMENT WORKS FORFEITURE OF POLICY—see FRAUD, 1.

OVER-ESTIMATE OF LOSS NOT CONCLUSIVE PROOF OF FRAUD—see FRAUD, 2.

MISREPRESENTATION BY INSURED—QUESTION OF FACT—see QUESTIONS OF LAW AND FACT, 1.

JURY TO DETERMINE WHAT CHANGE IN BUILDING IS MATERIAL TO FIRE RISK—see QUESTIONS OF LAW AND FACT, 2.

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INSTRUCTIONS AND REMARKS OF JUDGE TO JURY—see CHARGES, *passim*.

JUDGES—AS TO WHEN SPECIAL LEGISLATION IS PROPER—see LEGISLATURE, 1.

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CERTIFICATE OF JUDGE TO STATEMENT FOR NEW TRIAL—see STATEMENT, 2.

JUDGMENT.

JUDGMENT FOR SEVERAL NOT ALWAYS AN ENTIRETY. The rule that a joint judgment has to be reversed in toto, if not good as an entirety, does not apply under our statutes and system of practice. *Wood v. Olney*, 109.

JOINT JUDGMENT—AFFIRMANCE IN PART AND REVERSAL IN PART—see APPEAL, 5.

CLERICAL ERROR IN JUDGMENT MUST BE PRESENTED BELOW—see APPEAL, 13, 15.

ADMINISTRATOR BOUND BY DECREE OF SETTLEMENT—see EXECUTORS AND ADMINISTRATORS, 5.

GOLD COIN JUDGMENT IN TRESPASS CASE—see GOLD COIN.

MOTION TO DOCKET JUDGMENT NUNC PRO TUNC—see MOTIONS, 2.

JURISDICTION.

1. JUDICIAL INQUIRY AS TO SPECIAL AND LOCAL LEGISLATION. As the legislature has no authority to enact a local or special law when a general one can be made applicable, it is competent for the courts, in case of a special or local act properly presented to them, to inquire whether or not a general law could have been made applicable. *Hess v. Pegg*, 23.
2. JURISDICTION OF SUITS BETWEEN CITIZENS OF DIFFERENT STATES. The United States constitution (Art. III and Art. I, Secs. 8, sub. 17) vests full control and jurisdiction in the federal government over all suits "between citizens of different states"; and congress may assume jurisdiction of such cases at any stage by vesting it absolutely and exclusively in the federal courts. *Meadow Valley Mining Co. v. Dodds*, 143.

JURISDICTION ON CERTIORARI—see CERTIORARI, 2, 3.

TRANSFER OF ACTION TO U. S. CIRCUIT COURT—see TRANSFER, 1, 2.

JURY.

1. ABSENCE OF JUROR—PRESUMPTION OF REGULARITY. Where the record in a criminal case showed that while a witness was giving some immaterial testimony, a juror, who had been absent, came into court: *Held*, that the presumption was, until the contrary appeared, that the juror was absent by the permission of the court and in charge of its officer. *State v. Parsons*, 57.
2. WRITTEN FINDINGS BY JURY TO BE PROPERLY ASKED FOR. If a party desires a written finding by a jury upon particular questions of fact, he should before the jury retires request the court to instruct them to bring in a written finding upon such questions; and, if not so asked, it is no error, after the jury has brought in a general verdict, to refuse to send them back to find specific answers to special interrogatories. *Lambert v. McFarland*, 159.
3. OBJECTIONS FOR IRREGULARITY IN DRAWING TRIAL JURY, MUST BE DISTINCTLY SHOWN. If it be desired in a criminal case to take advantage on appeal of an objection that the trial jury was irregularly drawn and impaneled, the facts showing the irregularity should be distinctly stated in the record; and in the first place it should be shown how the jury was in fact selected. *State v. Roderigas*, 328.

EMPTORY CHALLENGE MAY BE REQUIRED IMMEDIATELY AFTER CHALLENGE FOR CAUSE. Where a defendant in a criminal cause was required to accept or emptorily challenge each juror immediately after it was found that there was no ground of challenge for cause: *Held*, no error. *State v. Roderigas*, 328.

SEPARATION OF JUROR IN CHARGE OF OFFICER—PRESUMPTION. Where a juror in a criminal case separated from his fellows, but was shown to have been in charge of a proper officer: *Held*, that a presumption that he could have been tampered with during such separation was inadmissible. *State v. Jones Nery*, 408.

CONDUCT OF JURY — DRINKING SPIRITUOUS LIQUORS. The mere drinking of spirituous liquor by a juror, when not furnished by the prevailing party, is not an irregularity or misconduct as will vitiate a verdict. *State v. Jones and Nery*, 408.

EXPOSING JURY TO LIQUOR—WHAT WILL NOT VITIATE VERDICT. Where a jury, on their return from taking a view of the property in controversy, were exposed to liquor by a person who had been at the instance of the prevailing party selected by the court to point out the premises, and who had made a statement of them for such party: *Held*, that the showing of such person's agency and interest in the result of the suit was not sufficient to vitiate the verdict. *Wissler v. Chesshire*, 427.

INSTRUCTION TO JURY THAT VERDICT EITHER WAY WILL BE CORRECT— see CHARGE, 2.

INSTRUCTION INTIMATING JUDGE'S OPINION ON FACTS—see CHARGE, 3.

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INSTRUCTION OF JUDGE TO JURY IN CRIMINAL CASE TO "AGREE QUICKLY"—see CHARGE, 8.

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CRIMINAL LAW—ORAL REMARKS OF JUDGE TO JURY—REQUEST TO AGREE— see CHARGE, 11.

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CRIMINAL LAW—SEPARATION OF JURY—see CRIMINAL LAW, 14.

PAYMENT OF JURORS' FEES BY COUNTIES—PEREMPTORY STATUTE—see FEE.

RIGHT TO SPECIAL FINDINGS BY JURY—see FINDINGS, 3.

QUESTIONS OF FACT FOR JURY IN INSURANCE CASES—see QUESTIONS OF LAW AND FACT, 1, 2.

JURORS' FEES NOT TO BE PASSED UPON BY COUNTY COMMISSIONERS—see STATUTES, 5.

JUSTICE OF THE PEACE.

JUSTICES' COURTS—STAY OF EXECUTION IN CASE OF APPEAL. In case of the due perfection of an appeal from a justice's court to a district court, the justice has the power to stay proceedings under an execution previously issued, and the district court to supersede or stay one issued after such appeal. *Hamer v. Kane*, 61.

LAND.

1. **SCHOOL LAND WARRANT NOT RECEIVABLE FOR OTHER THAN SCHOOL OR LIEU LAND.** Where one Cleaveland applied to the state to purchase certain public land, which however was not part of a sixteenth or thirty-sixth section, or of land selected in lieu thereof, and deposited a land warrant issued under the act of February 27th, 1865, to pay therefor, (Stats. 1864-5, 173 ; 1866, 194): *Held*, that such warrant was not receivable in payment for that class of land, and that no right accrued to Cleaveland or his grantees. *State ex rel. Sharon v. Treadway*, 241.
2. **LANDS PURCHASABLE WITH SCHOOL LAND WARRANTS.** The only land which could be purchased with a school land warrant, as the law stood in 1868 and 1869, was that embraced in a sixteenth or thirty-sixth section or land selected in lieu thereof. *State ex rel. Sharon v. Treadway*, 241.
3. **ENTRY OF LAND ON UNLOCATED LAND WARRANTS.** The privilege given by Section 7 of the Act of April 2, 1867, (Stats. 1867, 165) to "the holders of any unlocated land warrant," is limited to lands "subject to sale by private entry." *State ex rel. Sharon v. Treadway*, 241.
4. **EFFECT OF UTAH TERRITORIAL LEGISLATION AS TO PUBLIC LAND.** Before the United States can be held bound by the acts of the territorial legislature of Utah as to the public land, it must appear that such legislation was submitted to Congress and not disapproved by it. *Vansickle v. Haines*, 249.
5. **PREEMPTIONER ON ONE QUARTER SECTION HAS NO RIGHT TO DIVERT WATER FROM ANOTHER.** A preëmptioner, while occupying and improving a quarter section of the public land, has no right to enter upon another quarter section,

to which he makes no claim, and divert from it a valuable stream of water for the benefit of the land which he is claiming. *Vansickle v. Haines*, 249.

ADVERSE USE OF WATER ON PUBLIC LAND CANNOT BE SET UP AGAINST PATENTEE—see ADVERSE HOLDING.

COVENANT RUNNING WITH LAND, HOW CREATED—see COVENANT, 2, 3.

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NO PRESUMPTION OF GRANT AGAINST GOVERNMENT—see PRESUMPTIONS, 4.

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WATER RIGHTS ON PUBLIC LANDS—see WATER RIGHTS, 1.

RIGHT OF LAND OWNER TO DIG FOR WATER ON IT—see WATER RIGHTS, 5, 6, 7.

LEGISLATURE.

JUDGES AS TO WHEN SPECIAL LEGISLATION IS PROPER. The decision as to whether a special or local law can be passed, or in other words, whether or not a general law can be made applicable, is primarily in the legislature; and its decision, though subject to review by the courts, will be presumptively correct. *Hess v. Pegg*, 23.

LEGISLATIVE POWER AS TO RIGHT OF SUFFRAGE. The legislature can add no qualification as title to the right of suffrage to those prescribed by the constitution. *Clayton v. Harris*, 64.

APPLICATION OF STATUTE REGULATING COUNTY BUSINESS. Whether the legislature can or cannot convert a moral obligation into a legal demand against a county, or fix a salary or compensation of a county officer by special enactment, it clearly has no power by a special act to repeal the general law regulating county business, (Stats. 1864-5, 257) or dispense with its provisions in

favor of a particular person, leaving it in force as to all others. *Williams v. Bidleman*, 68.

POWERS OF LEGISLATURE AS LIMITED BY CONSTITUTIONAL PROVISIONS—see CONSTITUTION, *passim*.

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STATUTE LICENSING GAMBLING ONLY PROTECTS FROM CRIMINAL PROSECUTION—see GAMING, 2.

LANDLORD AND TENANT.

PRINCIPLE OF TENANT'S RIGHT TO REMOVE FIXTURES. The law indulges a tenant with the right of removing fixtures during his term, not out of any regard to his intention, but by way of exception to a rule which would otherwise work hardship or retard improvement. *Treadway v. Sharon*, 37.

ADMISSION OF LEASE WITHOUT CALLING SUBSCRIBING WITNESS, ERROR—see EVIDENCE, 1.

LIMITATIONS.

PAROL ADOPTION OF WRITTEN CONTRACT—STATUTE OF LIMITATIONS. If a party adopt by mere parol promise the written contract of another, his obligation will be barred by the limitation prescribed for parol contracts. *Wheeler v. Schad*, 204.

ADVERSE USE OF WATER ON PUBLIC LAND CANNOT BE SET UP AGAINST PATENTEE—see ADVERSE HOLDING.

NO PRESUMPTION OF GRANT AGAINST GOVERNMENT—see PRESUMPTIONS, 4.

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LIMITATION OF TIME PRESCRIBED BY STATUTE TO PRESENT CLAIMS—MATURITY—see TIME.

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MANDAMUS TO ADMIT NEGRO IN PUBLIC SCHOOLS—see NEGROES.

MINES.

- **"TAILINGS" CLAIMS ANALOGOUS TO MINING CLAIMS.** If land be valuable only for the metals which it may contain, such as land on which tailings have been deposited, and it is not claimed for any other purpose, the acquisition of a possessory title to it is governed by the same rules ordinarily controlling possessory titles to mining claims. *Rogers v. Cooney*, 213.
- **FENCING NOT NECESSARY TO POSSESSION OF MINING CLAIM.** Fencing a mining claim would serve no useful purpose except to mark its boundaries; and any other means which will accomplish that object will equally answer the requirements of the law as to the possession of such a claim. *Rogers v. Cooney*, 213.
- **BOUNDARIES OF MINING CLAIM—CHARGE APT TO MISLEAD.** Where an instruction was given, in a case of dispute between two adjoining mining companies as to their boundary, that "when boundaries have been established defining and denoting the size and limits of the claim upon the surface, and for a long period have been recognized as such, the extent of the claim will be confined to the extent as manifested by such surface boundaries"; and the state of the testimony was such that the instruction applied to, or was apt to be understood by the jury to refer to, a fixing or recognition of boundaries accruing after the consummation of the original location and appropriation, and consisting merely in the declarations of superintendents and other officers not authorized to fix boundaries: *Held*, error. *Overman S. M. Co. v. American M. Co.*, 312.
- 1. **MINING CLAIMS NOT TO BE REDUCED BY MERE DECLARATIONS OF SUPERINTENDENTS.** After a vested right to a mining company's claim has been acquired by a compliance with the laws, it is not held by so precarious a tenure as that it can be reduced by mere declarations of superintendents and officers. *Overman S. M. Co. v. American M. Co.*, 312.
- 2. **EXTENT OF MINING COMPANY'S CLAIM—DECLARATIONS OF PRESIDENT.** It seems that in a dispute as to the extent of a mining company's claim, the declarations of the president as to the position of the boundaries, if objected to, are not admissible in evidence. *Overman S. M. Co. v. American M. Co.*, 312.
- 3. **MINING LAW—INSTRUCTIONS SHOULD BE BASED UPON POINTS INVOLVED.** Where in a suit to recover possession of a mine, plaintiff asked the court to instruct the jury "that the doctrine that plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendant, has no application in this case: the real question here involved is, which of the parties, the plaintiff or defendant, has the better right to mine the land in question"; and it was claimed that without it the jury might have presumed the title to be in the government, and therefore found against plaintiff; but it appeared that as a matter of fact no suggestion or point of the kind was made on the trial: *Held*, that the refusal to give such instruction was not error. *Schissler v. Chesshire*, 427.

POSSESSION OF LAND VALUABLE ONLY FOR TAILINGS—see POSSESSION, 1.

MORTGAGE.

ABSOLUTE CONVEYANCE MAY BE SHOWN MORTGAGE BY PAROL—see DEED.

MOTION.

1. NO INJUNCTION WHERE MOTION AFFORDS REMEDY. As the remedy by injunction has always been denied when there is a plain, adequate and convenient remedy at law, upon analogous principle and stronger reason should it be denied when the end sought may be obtained by mere motion in an action pending. *Hamer v. Kane*, 61.
2. MOTION "NOT OF COURSE" ORDINARILY TO BE ON NOTICE. Where an ex parte motion was made in 1871 for the docketing, *nunc pro tunc*, of a judgment rendered in 1866, against defendants who had appeared; and it became necessary on the application to determine several questions of fact: *Held*, that such a motion should not be entertained except on notice to the opposite party, and that the refusal to vacate an order obtained under such circumstances was error. *Pratt v. Rice*, 123.

MOTION TO STRIKE OUT RETURN ON CERTIORARI—see CERTIORARI, 1.

MOTION TO RESTRAIN ISSUANCE OF EXECUTION—see INJUNCTION, 1.

MOTION TO DISSOLVE INJUNCTION—see INJUNCTION, 2.

RIGHT OF PARTY TO NOTICE OF MOTION—see NOTICE.

NOTICE OF MOTION, WHEN REQUIRED—see PRACTICE, 1.

MURDER.

1. JUSTIFIABLE HOMICIDE—RETREAT NOT NECESSARY AFTER THREATS AND HOSTILE DEMONSTRATIONS. Where on a murder trial it appeared that deceased had beaten defendant in a brutal manner, and when compelled by third persons to desist, had in the hearing of defendant asked for a pistol, and said he would shoot him on sight; and that when they next met, deceased, without being assailed, rushed at defendant with hostile demonstrations: *Held*, that if the demonstrations were such as to justify the belief that the deceased intended to carry out his threat, defendant would be justified in killing him without retreating. *State v. Kennedy*, 374.
2. INDICTMENT FOR MURDER—DEMURRER—SURPLUSAGE. Where an indictment for murder, in other respects sufficient, charged that defendant "feloniously, willfully and with malice aforethought, to kill William Hardwick, did with his hands and feet strike, beat and kick," &c., going on to charge the infliction thereby of mortal wounds upon deceased, from which he died; and a demurrer was interposed on the ground that the facts stated did not constitute

an offense known to the statute: *Held*, properly overruled, for the reason that the words "to kill William Hardwick" might be rejected as surplusage, and an indictment for murder, good on general demurrer, would still remain. *State v. Harkin*, 377.

INSTRUCTION IN MURDER CASE, THAT CERTAIN FACTS WOULD NOT AMOUNT TO MORE THAN MANSLAUGHTER—see CHARGE, 1.

FACTS SUFFICIENT TO CONSTITUTE "ASSAULT WITH INTENT TO COMMIT MURDER"—see CRIMINAL LAW, 10, 11.

INFORMAL ALLEGATION OF INTENT TO MURDER—see INDICTMENT, 4.

NEGLIGENCE.

MEASURE OF DAMAGES FOR LOSS BY NEGLECT OF ADMINISTRATOR—see DAMAGES, 2.

LIABILITY OF ADMINISTRATOR FOR NEGLIGENCE—see EXECUTORS AND ADMINISTRATORS, 1, 2, 6.

NEGROES.

NEGROES IN THE PUBLIC SCHOOLS—MANDAMUS. Where the trustees of a public school refused to admit a negro, between the ages of six and eighteen, and a resident of the district, as a pupil into such school: *Held*, that an application for mandamus to compel such admission should be granted. *State ex rel. Stoutmeyer v. Duffy*, 342.

NEW TRIAL.

AUTHENTICATION OF AFFIDAVITS FOR NEW TRIAL. Where affidavits in reference to certain remarks by the court below on a criminal trial were copied into the bill of exceptions; but there was nothing to show that they had been filed or used on the motion for a new trial: *Held*, that the Supreme Court, on appeal, could not regard them. *State v. Parsons*, 57.

APPEAL ON RULINGS—MOTION FOR NEW TRIAL NOT NECESSARY—see APPEAL, 8.

NO CONSIDERATION OF INSUFFICIENCY OF EVIDENCE ON APPEAL, WHERE NO MOTION FOR NEW TRIAL—see APPEAL, 16, 18.

CERTIFICATE OF JUDGE TO STATEMENT FOR NEW TRIAL—see STATEMENT, 2.

NONSUIT.

MATTER OF NONSUIT A QUESTION OF LAW. Whether a case should be withdrawn

from the jury and the plaintiff be nonsuited, is purely a question of law. *Cooper v. Pacific Mutual Life Ins. Co.*, 116.

2. **ACTION FOR MONEY HAD AND RECEIVED—GROUND OF NONSUIT WAIVED IF NOT URGED AT PROPER TIME.** Where, in an action against Wells, Fargo & Co., for money had and received, the testimony introduced by plaintiff showed that he had delivered to defendant's agent a certificate of deposit, with instructions to renew it, but instead of doing so the agent had procured it to be cashed, and appropriated the money to his own use; and defendant moved for a nonsuit on the ground that the action "could not be maintained for the loss of a certificate of deposit," which was denied: *Held*, on appeal, that though a motion for nonsuit might have been sustained on the ground that the action for money had and received would not lie for malfeasance of defendant's agent; yet, no such ground having been taken, and a liability of defendant having been established, (though not upon contract as alleged) the judgment for plaintiff should not be disturbed. *Dougherty v. Wells, Fargo & Co.*, 368.

NOTICE.

RIGHT OF PARTY TO NOTICE OF MOTION. If on a motion there is no good cause for haste or concealment, and facts are to be found in the ascertainment of which the opposite party is deeply interested, such party has a right to notice and an opportunity to be heard. *Pratt v. Rice*, 123.

MOTION "NOT OF COURSE," ORDINARILY TO BE A NOTICE—see MOTION, 2.

NOTICE OF MOTION, WHEN REQUIRED—see PRACTICE, 1.

OATH.

OATH AS TEST OF ELECTORAL QUALIFICATION—see CONSTITUTION, 2.

REGISTRY LAW ALLEGIANCE OATH UNCONSTITUTIONAL—see ELECTIONS, 1, 2.

ORDER.

1. **ORDER OF JUDGE NOT FILED WITHIN HIS TERM OF OFFICE.** Where a district judge on the last day of his term of office made an order overruling a demurrer, which, however, was not filed until a week afterwards: *Held*, no valid order and that the action of his successor in setting it aside and hearing the issue anew was proper. *Schultz v. Winter*, 130.
2. **ORDERS MADE IN VACATION NOT VALID TILL ENTERED.** An order of a judge upon an issue of law, if it be a final judgment, may be entered in term or vacation; but such an order in vacation can have no vitality until it be at least delivered to the clerk for filing. *Schultz v. Winter*, 130.

RECORD ON APPEAL MUST SHOW ACTION APPEALED FROM—see APPEAL, 1.

PARTIES.

ACTION ON CONTRACT BY PARTY HAVING INTEREST IN ITS PERFORMANCE—see ACTION.

MAKING PARTIES WITNESSES DOES NOT CHANGE RULES OF EVIDENCE—see EVIDENCE, 2.

TESTIMONY OF PARTY NOT BEST EVIDENCE WHERE SUBSCRIBING WITNESS—see EVIDENCE, 3.

COVENANT TO PAY LIQUIDATED DAMAGES—WHEN PAROL EVIDENCE OF SITUATION OF PARTIES ALLOWABLE—see EVIDENCE, 14.

RIGHT OF PARTY TO NOTICE OF MOTION—see NOTICE.

PATENTS.

1. **REMOVAL AFTER PATENT, OF FIXTURES ERECTED ON PUBLIC LAND.** Where occupants of public land erected fixtures, consisting of a saw-mill, thereon, but failed to take any steps to acquire the title to the same; and afterward the land was selected by the state, and (not being applied for by the occupants within six months) was duly sold and patented to other parties, subsequent to which the occupants removed the mill: *Held*, that they were trespassers, and liable in damages for such removal. *Treadway v. Sharon*, 37.
2. **PATENT TO LAND PASSES UNINCUMBERED FEE OF SOIL AND INCIDENTS.** A patent to land from the United States passes to the patentee the unincumbered fee of the soil, with all its incidents and appurtenances, among which is the right to the benefit of all streams of water which naturally flow through it. *Vansickle v. Haines*, 249.
3. **RIGHT OF PATENTEE TO HAVE DIVERTED WATER RETURNED TO NATURAL CHANNEL.** A patent to land from the United States, (previous to the act of congress of July, 1866) carried with it a stream naturally running through such land as an incident thereto, together with the right to have it returned to its channel, if diverted. *Vansickle v. Haines*, 249.
4. **TITLE BY PATENT WIPES OUT ALL FORMER TITLES.** Where a person acquires a United States patent to land, he acquires a new title, against which there is no prescription; in other words, his patent sweeps away all former titles, and confers upon him as complete a title as the United States had. *Vansickle v. Haines*, 249.

ADVERSE USER OF WATER ON PUBLIC LAND CANNOT BE SET UP AGAINST PATENTEE—see ADVERSE HOLDING.

PENALTY.

RULE AS TO WHAT SHALL BE "PENALTY" INSTEAD OF "LIQUIDATED DAMAGES." Where parties stipulate for the payment of a large sum of money as damages for the failure or nonpayment of a smaller sum at a given time, such large sum so agreed upon, no matter what may be the language of the parties, will be deemed a penalty and not liquidated damages. *Morris v. McCoy*, 399.

COVENANT FOR PERFORMANCE OF VARIOUS ACTS—WHEN STIPULATED DAMAGES WERE PENALTY—see COVENANT, 4.

PLACE OF TRIAL.

(See **VENUE**.)

PLEADING.

1. **PLEADING—GENERAL DENIAL AND TENDER OF SMALLER SUM.** There is no such absolute repugnance between a denial of an alleged employment and an offer to pay a smaller sum than that claimed, as to prevent them both being pleaded in the same answer. *Clarke v. Lyon County*, 75.
2. **ADMISSIONS BY IMPLICATION—AMENDMENTS.** If advantage is to be claimed or reliance placed upon an admission in a pleading which results solely from construction or implication, and where, as a consequence, the pleader may be misled to his injury, it must be done before the opportunity for amendment has passed. *Clarke v. Lyon County*, 75.
3. **LIBERAL CONSTRUCTION OF PLEADINGS.** The old common law rule, that a pleading must be construed most strongly against the pleader, is replaced by the broader, more sensible and just rule of the code, that it shall be liberally construed with a view to substantial justice between the parties. *State v. Central Pacific Railroad Company*, 99.
4. **JOINT DEMURRER—SEPARATE ORDERS THEREON.** A joint demurrer may be sustained as to one defendant, and overruled as to another. *Wood v. Olney*, 109.
5. **MULTIFARIOUSNESS OF COMPLAINT.** Where a complaint set forth that plaintiffs had appropriated separate and distinct portions of the waters of a creek flowing through their respective lands, and that afterwards defendants had absorbed nearly the entire waters, to the damage of plaintiffs in a certain amount, and threatened to continue such absorption, and praying for damages, an injunction and a settlement of the various rights of plaintiffs by a general decree : *Held*, demurrable for multifariousness. *Schultz v. Winter*, 130.
6. **IMMATERIAL ALLEGATIONS NEED NOT BE PROVED AS LAID.** Immaterial allegations, such as probative facts not descriptive of some essential averment, need not be proved as laid. *James v. Goodenough*, 324.

7. **IMMATERIAL AVERMENTS AS TO TIME OF ACTS DONE.** Where, in a complaint for the diversion of the waters of a creek, it was alleged that plaintiff first recorded a claim to the water and afterwards constructed a flume for leading it to his land: *Held*, that, supposing the allegations to be material, it was immaterial which was prior in point of time, and that therefore a variance in the proof from the priority as alleged was equally immaterial. *James v. Good-enough*, 324.
8. **"NEW MATTER" IN ACTION ON CONTRACT.** As "new matter" is matter in confession and avoidance, such as cannot be introduced in evidence under an answer simply denying the allegations of the complaint, it follows that in an action on a contract it is not proving new matter for the defendant to show that there are other terms in the contract relied on besides those shown by plaintiff, whether such proof be calculated to defeat the action or only to reduce the damages. *Ferguson v. Rutherford*, 385.
9. **PLEADING—EVIDENCE NOT OBJECTIONABLE BECAUSE COMPLAINT NOT PARTICULAR ENOUGH.** Where a complaint against the sureties of a State Treasurer alleged a conversion of money belonging to his office, and moneys of the state, to the extent of \$106,432.88, and that no portion of the same was delivered to his successor: *Held*, that though such a pleading might be obnoxious to a demurrer, or motion for greater particularity, no objection to evidence sustaining the facts so pleaded could be made upon any such ground. *State v. Rhoades*, 434.

NO RECOVERY ON CONTRACT NOT COVERED BY PLEADINGS—see CONTRACT, 7.

MEANING OF ALLEGATION OF "FAIR VALUATION" IN ANSWER TO TAX SUIT
—see DEFINITIONS, 1.

PROBATA NOT TO GO BEYOND ALLEGATA—see EVIDENCE, 7.

CORRESPONDENCE OF ALLEGATA AND PROBATA ONLY REQUIRED IN ESSENTIAL PARTICULARS—see EVIDENCE, 9.

FAILURE TO DENY DEMAND AND REFUSAL NOT NECESSARILY ADMISSION OF CONVERSION—see EXECUTORS AND ADMINISTRATORS, 6.

ALLOWANCE OF ANSWER AFTER TIME GENERALLY MATTER OF DISCRETION—see PRACTICE, 6.

TAX SUIT—FRAUD IN ASSESSMENT AS MATTER OF DEFENSE—see TAXES, 4.

PLEA OF TENDER OF SMALLER SUM NOT AN ADMISSION—see TENDER, 1, 2.

POSSESSION.

1. **POSSESSION OF LAND VALUABLE ONLY FOR TAILINGS.** Where a person entered upon vacant land, upon which tailings were deposited, for the purpose of dig-

ging them up, hauling them away and milling them, and caused a survey to be made and recorded, marked the boundaries with large posts firmly set in the ground at the corners and one in the center of one of the sides, and thereafter continued to work the claim and built a cabin on it, which was used for storing the tools employed on the premises: *Held*, that he had a possession sufficient to maintain trespass against an intruder entering within his boundaries. *Rogers v. Cooney*, 213.

2. **DISTINCTION BETWEEN POSSESSION OF MINING CLAIM AND POSSESSION OF FARMING LAND.** The same acts which are required to enable a settler to obtain actual possession of pasture or agricultural land, so as to subject it to the purpose for which it is useful, are not demanded when the claim is only of mining ground. *Rogers v. Cooney*, 213.
3. **"PRIOR APPROPRIATION" OF WATER NOT AVAILABLE AGAINST TITLE TO SOIL.** The early decisions of this state and those of California, holding that priority of appropriation gave a right to the use of water, were made in cases where there was no title to the soil, and have no bearing in cases where absolute title has been acquired. *Vansickle v. Haines*, 249.

FENCING NOT NECESSARY TO POSSESSION OF MINING CLAIM—see **MINES**, 2.

PRACTICE.

1. **NOTICE OF MOTION, WHEN REQUIRED.** When the nature of a motion, involving the determination of facts, is of a kind to prevent the performance of some act which, if performed, might be productive of irreparable injury, and it becomes desirable that the party to be affected should have no previous intimation thereof, it may be granted on affidavit without notice to the opposite party; but when there is no such danger, notice should be given. *Pratt v. Rice*, 123.
2. **TRANSFER OF CASES TO U. S. CIRCUIT COURT.** Where in a suit commenced in a district court by a citizen of a foreign state against a citizen of this state, the plaintiff made an application to transfer it to the United States circuit court in accordance with the act of congress of March 2d, 1867: *Held*, that the refusal of the application was error. *Meadow Valley Mining Co. v. Dodds*, 143.
3. **PRACTICE ON REFUSAL OF CONTINUANCE.** Where a continuance on account of the absence of a witness is refused, the safer practice is to embody all the testimony in a bill of exceptions; and on motion for a new trial to file the affidavit of the witness, if procurable, setting forth the facts within his knowledge. *State v. O'Flaherty*, 153.
4. **ONLY INTERESTED PERSON CAN COMPLAIN OF VIOLATION OF VESTED RIGHTS.** Courts will not declare a statute void as infringing vested rights, except at the instance of a party whose rights are violated or impaired. *Matter of Estate of Henry Sticknoth*, 223.

5. **STATUTE WAIVING ESCHAT NOT REGULATION OF PRACTICE.** The statute providing for the admission to probate of the unattested will of Henry Sticknoth (Stats. 1871, 129) is not a regulation of the practice of a court of justice, and does not, in that respect, violate the constitution. Art. IV, Sec. 20. *Matter of Estate of Henry Sticknoth*, 228.
6. **ALLOWANCE OF ANSWER AFTER TIME GENERALLY MATTER OF DISCRETION.** The allowance of the filing of an answer after the time prescribed by statute is a matter very much in the discretion of the district court, and especially so where there has been no default entered, and there is no showing that a failure to plead has occasioned any delay or injury to the opposite party. *Conley v. Chedic*, 386.
7. **RIGHT OF DEFENDANT ON CROSS-EXAMINATION OF PLAINTIFF.** Where in an action on contract the plaintiff took the stand and testified to the existence and terms of the contract as claimed by him: *Held*, that the defendant had the right to draw out, on cross-examination and by leading questions, anything which would tend to contradict, weaken or modify the direct testimony of plaintiff, or any inference which might have resulted from it, tending in any degree to support his case. *Ferguson v. Rutherford*, 385.

PRACTICE ON APPEAL—POINT NOT MADE BELOW—see APPEAL, 4.

JOINT JUDGMENT—AFFIRMANCE IN PART AND REVERSAL IN PART—see APPEAL, 5.

DISMISSAL OF APPEAL "WITHOUT PREJUDICE"—see APPEAL, 6.

APPEAL ON RULINGS—MOTION FOR NEW TRIAL NOT NECESSARY—see APPEAL, 8.

ARGUMENTS ON APPEAL OUTSIDE OF RECORD—see APPEAL, 12.

CLERICAL ERROR IN JUDGMENT MUST BE PRESENTED BELOW—see APPEAL, 13, 15.

STRIKING OUT REITERATIONS IN INSTRUCTIONS—see CHARGE, 5.

DIFFERENCE BETWEEN CIVIL AND CRIMINAL PRACTICE AS TO REFUSING INSTRUCTIONS—see CHARGE, 7.

NO RECOVERY ON CONTRACT NOT COVERED BY PLEADINGS—see CONTRACT, 7.

OFFER OF DEPOSITIONS IN CRIMINAL CASES—PRELIMINARY PROOF—see CRIMINAL LAW, 16.

PROBATA NOT TO GO BEYOND ALLEGATA—see EVIDENCE, 7.

JUDGMENT FOR SEVERAL NOT ALWAYS AN ENTIRETY—see JUDGMENT.

WRITTEN FINDINGS BY JURY TO BE PROPERLY ASKED FOR—see JURY, 2.

STAY OF EXECUTION ON APPEAL FROM JUSTICE—see JUSTICE OF THE PEACE.

MOTION "NOT OF COURSE" ORDINARILY TO BE ON NOTICE—see MOTION, 2.

WANT OF AUTHENTICATION OF AFFIDAVITS FOR NEW TRIAL ON APPEAL—see NEW TRIAL.

MATTER OF NONSUIT A QUESTION OF LAW—see NONSUIT, 1.

ORDER OF JUDGE NOT FILED WITHIN HIS TERM OF OFFICE—see ORDER, 1.

ORDERS MADE IN VACATION NOT VALID TILL DELIVERED FOR FILING—see ORDER, 2.

JOINT DEMURRER—SEPARATE ORDERS THEREON—see PLEADING, 4.

PLEADING—EVIDENCE NOT OBJECTIONABLE BECAUSE COMPLAINT NOT PARTICULAR ENOUGH—see PLEADING, 9.



PRACTICE ACT.

PRACTICE ACT, SECTION 197—MEANING OF "SETTLED" IN JUDGE'S CERTIFICATE. The express requirement of the statute, that a judge's certificate to a settled statement on motion for new trial shall affirm its correctness, (Practice Act, Sec. 197) does not preclude such presumptions as fairly arise from the language actually employed; so that when a judge certifies that he has settled a statement, he in effect certifies that it is a true and correct statement. *Overman S. M. Co. v. American M. Co.*, 312.

PRACTICE ACT, SECTION 407—REQUISITES OF AFFIDAVIT TO TAKE DEPOSITIONS—see DEPOSITIONS.

DEFENSES ALLOWED UNDER PRACTICE ACT—see TENDER, 1.

PRESUMPTIONS.

1. PRESUMPTION WHERE BOTH GENERAL AND SPECIAL STATUTES. Where, notwithstanding the existence of a general statute in relation to the removal of county seats, the legislature passed a special act in reference to the removal of a particular county seat: *Held*, that the presumption was that the general act was not and could not be made applicable. *Hess v. Pegg*, 23.
2. MATERIALITY OF REPRESENTATION NOT TO BE ASSUMED AGAINST INSURED. As a warranty will not be created or extended by construction or implication; so the intention of the parties to an insurance contract to conclude by convention the question of the materiality of a representation should be clearly manifested; and in case of doubt, the doubt is to be resolved in favor of the insured. *Gerhauser v. North British and M. Ins. Co.*, 174.
3. PRESUMPTIONS IN FAVOR OF PROPER JUDICIAL ACTION. Where the unattested paper purporting to be the will of Henry Sticknoth, deceased, was admitted to

probate in accordance with the provisions of the act of March 4th, 1871, relating thereto, (Stats. 1871, 129): *Held*, that the presumptions were in favor of the validity of the action of the legislature and of the court below; that, as nothing appeared to the contrary, it should be assumed the deceased left no heirs, and that the state alone had an interest in preventing the probate of such will. *Matter of Estate of Henry Sticknoth*, 223.

4. **NO PRESUMPTION OF GRANT AGAINST GOVERNMENT.** The diversion and appropriation of the water of a creek on the public land gives rise to no presumption of a grant as against the government; and, except in cases specially provided for, no statute of limitation runs against it. *Vansickle v. Haines*, 249.
5. **NATURE OF PRESUMPTION ARISING FROM ADVERSE HOLDING.** The presumption arising from adverse holding or user for the period prescribed by the statute of limitations, is not a presumption of a grant against any particular person, but against the *title* under which he holds. *Vansickle v. Haines*, 249.
6. **PRESUMPTION RESPECTING ADVERSE USER OF WATER SAME AS OF LAND.** The presumption respecting the adverse user of water stands upon the same footing as that respecting the adverse user of land; and the reasoning which will sustain the one will likewise uphold the other. *Vansickle v. Haines*, 249.
7. **PRESUMPTIONS IN FAVOR OF JUDGE'S CERTIFICATE.** Where a district judge certified that a statement on motion for new trial was "the settled and engrossed statement on such motion": *Held*, that giving proper effect to the legal presumptions in favor of the action of the judge, the certificate implied that a proposed statement was presented; that it was unsatisfactory; that amendments were filed; that on due notice the judge considered and passed upon the same, allowing such as made the statement conform to the truth; and that the document was a fair and correct copy of such statement as amended. *Overman S. M. Co. v. American M. Co.*, 312.

NO PRESUMPTION OF RECEPTION BY PRINCIPAL OF MONEY FRAUDULENTLY OBTAINED BY AGENT—see AGENCY, 1.

PRESUMPTIONS IN FAVOR OF RESPONDENT'S TESTIMONY WHERE CONFLICT—see APPEAL, 10.

ANSWER TO IMPROPER QUESTION PRESUMED HARMLESS, IF ANSWER NOT SHOWN—see APPEAL, 11.

STATE TREASURER'S BONDS—MONEY RECEIVED DURING FORMER TERM—PRESUMPTIONS—see BONDS.

DEFAULT TO BE AVAILABLE MUST BE SHOWN BY RECORD—PRESUMPTION—see DEFAULT.

ABSENCE OF JUROR PRESUMPTION OF REGULARITY—see JURY, 1.

SEPARATION OF JUROR IN CHARGE OF OFFICER—PRESUMPTION—see JURY, 5.

STATEMENT NOT SHOWING ALL THE EVIDENCE—FACTS ASSUMED—see STATEMENT, 1.

LIMITATION OF TIME IN STATUTE TO PRESENT CLAIMS—PRESUMPTION OF MATERIALITY—see TIME.

PRIVITY.

COVENANT RUNNING WITH LAND REQUIRES PRIVITY OF ESTATE—see COVENANT, 2.

PROBATE.

DUTIES AND LIABILITIES OF ADMINISTRATORS—see EXECUTORS AND ADMINISTRATORS, 1, 2, 3, 6.

INVENTORY NOT CONCLUSIVE EVIDENCE—see EXECUTORS AND ADMINISTRATORS, 4.

ADMINISTRATOR BOUND BY DECREE OF SETTLEMENT—see EXECUTORS AND ADMINISTRATORS, 5.

STATUTE VALIDATING UNATTESTED WILL—see STATUTE, 3, 4.

PUBLIC ADMINISTRATOR.

PUBLIC ADMINISTRATOR HAS NO VESTED RIGHTS IN ESCHEATED ESTATES. Where a person owning an estate died without heirs, and leaving a paper purporting to be a will, but unattested; and the legislature passed an act to validate such paper as a will, and thereby in effect waived an escheat: *Held*, that the public administrator had no vested right to the estate or its administration, and no right to be heard urging that the act was unconstitutional. *Matter of Estate of Henry Sticknoth*, 228.

PUBLIC LAND.

(See LAND.)

QUESTIONS OF LAW AND FACT.

1. MISREPRESENTATION BY INSURED—QUESTION OF FACT. The question whether the representations made by an insured person are materially untrue, or untrue in some particular material to the risk, is a question of fact for the jury. *Gerhauser v. North British and M. Ins. Co.*, 174.
2. JURY TO DETERMINE WHAT CHANGE IN BUILDING IS MATERIAL TO FIRE RISK. Where in an insurance case the court refused to instruct that a certain sub-

stitution of wood for a portion of a brick wall was material, and left it to the jury to determine as a question of fact; and there was nothing in the policy in the nature of a warranty as to what condition of the building or representation thereof should be deemed material: *Held*, no error. *Gerhauser v. North British and M. Ins. Co.*, 174.

APPEAL ON QUESTIONS OF LAW—see APPEAL, 7, 8.

INSTRUCTION REMOVING QUESTION OF FACT FROM JURY PROPERLY REFUSED—see CHARGE, 4.

MATTER OF NONSUIT A QUESTION OF LAW—see NONSUIT, 1.

RAILROADS.

1. "LEGAL EXCUSE" OF RAILROAD TO FURNISH STATEMENTS. The "legal excuse" mentioned in section 8 of the act of 1869, requiring railroads to furnish statements of their taxable property, (Stats. 1869, 184) is only to be considered in case of a criminal prosecution as provided for by section 6 of the act of 1866, (Stats. 1866, 168) and not in proceedings before the board of equalization. (Stats. 1866, 169, Section 15.) *State ex rel. Thompson v. Board of Equalization of Washoe County*, 83.
2. RAILROAD BRIDGE NO INFRINGEMENT OF TOLL BRIDGE. A grant to a railroad company to cross a river with its railway, and transport passengers thereon in the ordinary course of its business, is not an infringement of a previous grant of the exclusive right of a toll bridge over such river. *Lake v. Virginia and Truckee R. R. Co.*, 294.
3. RAILROAD IMPROVEMENTS FAVORED BY LEGISLATION. In view of the territorial and state legislation in reference to railroads, it would require the clearest expression of legislative intention to uphold the grant of such an exclusive franchise of a toll road or bridge over a river, as would prevent railroad extension and improvement in the same direction. *Lake v. Virginia and Truckee R. R. Co.*, 294.
4. "RAILROAD BRIDGE" NOT AN ORDINARY "BRIDGE." The crossing of a river by a railroad track on piers, or what is known as a "railroad bridge," is neither a bridge, a ferry, nor any public means of crossing by any ordinary method of travel, such as is contemplated in ordinary legislation concerning toll roads and bridges. *Lake v. Virginia and Truckee R. R. Co.*, 294.

RAILROAD NO INTERFERENCE WITH TOLL ROAD AND BRIDGE—see BRIDGES, 2.

RATIFICATION.

BURDEN OF PROOF ON PLAINTIFF RELYING ON RATIFICATION. Where a plaintiff relies for a recovery upon ratification by defendant of an unauthorized con-

tract, it is incumbent upon him to prove that defendant knew of the contract, and not upon defendant to establish the negative. *Clarke v. Lyon County*, 75.

NO RATIFICATION OF UNAUTHORIZED CONTRACT BY PARTIAL ALLOWANCE—
see CONTRACT, 1.

NO RATIFICATION OF CONTRACT WITHOUT KNOWLEDGE OF IT—see CONTRACT, 2.

RATIFICATION EQUIVALENT TO EXECUTION OF CONTRACT—see CONTRACT, 3.

RECORD.

RECORD ON APPEAL—see TRANSCRIPT.

REGISTRY LAW.

(See ELECTIONS.)

RETURN.

CERTIORARI — INADMISSIBLE RETURN — WHOLE RETURN MAY INCLUDE — see
CERTIORARI, 1, 2.

ROADS.

RIGHT TO TOLLS ON TOLL ROADS AND BRIDGES—see BRIDGES, 1, 2.

SALE.

DECLARATION OF VENDOR AFTER SALE—see EVIDENCE, 8.

SAW MILL.

FIXTURES—STEAM SAW MILL, BOILER, ENGINE AND MACHINERY—see FIX-
TURES, 1, 2.

SCHOOLS.

POWER OF SCHOOL TRUSTEES TO "CLASSIFY" PUPILS. While school trustees cannot legally deny to any (such as a negro) resident person of proper age an equal participation in the benefits of the common schools; yet it is entirely within their power to send all blacks to one school and all whites to another; or, in other words, to make such classification, whether based on age, sex, race or any other existent condition, as may seem to them best. *State ex rel. Stoutmeyer v. Duffy*, 342.

EXCLUSION OF NEGROES FROM PUBLIC SCHOOLS UNCONSTITUTIONAL—see CONSTITUTION, 9.

STATUTE PREVENTING ESCHEAT NO TRANSFER FROM SCHOOL FUND—see ESCHEAT, 1.

SCHOOL LAND WARRANTS—see LAND, 1, 2.

MANDAMUS TO ADMIT NEGRO INTO PUBLIC SCHOOLS—see NEGROES.

SEAL.

OBJECTION OF WANT OF SEAL TO WILL—see WILL, 2.

SEAL TO WILL NEED NOT BE MENTIONED, NOR REMAIN—see WILL, 3.

SPECIAL DEPOSITS.

QUALIFIED PROPERTY OF STATE IN "SPECIAL DEPOSITS" IN STATE TREASURY. Though the state may not have the absolute, present right of property in the "special deposits" paid into the state treasury under the provisions of the land act of 1867, (Stats. 1867, 166, sec. 5) it has the right of present possession and custody, coupled with a contingent interest, and may maintain an action therefor. *State v. Rhoades*, 434.

LIABILITY OF STATE TREASURER'S SURETIES FOR SPECIAL DEPOSITS—see SURETIES, 2.

STAMPS.

1. **STATE STAMP DUTIES.** The schedule of stamp duties adopted in 1871 as part of the amendment to Section 126 of the general revenue act (Stats. 1871, 142) supersedes and abrogates all others, and is the only one in force. *Thorpe v. Schooling*, 15.
2. **NO STAMPS TO BANK CHECKS.** State stamp duties on bank checks were abrogated by operation of the Act of March 4th, 1871. *Thorpe v. Schooling*, 15.
3. **ONE STAMP WHERE TWO INSTRUMENTS CONSTITUTE ONE TRANSACTION.** Where a promissory note and agreement in relation thereto were executed together and constituted parts of one transaction; and the note was sufficiently stamped: *Held*, that the agreement required no separate stamp. *Bowker v. Goodwin*, 135.
4. **STATE REVENUE STAMPS ON FOREIGN BILLS.** The statute requiring the affixing of revenue stamps to foreign bills of exchange (Stats. 1871, 142) is not a regulation of commerce between this and other states, nor does it lay an impost or duty on exports within the meaning of Art. I, Secs. 8 and 10 of the United States constitution. *Ex parte James P. Martin*, 140.

CONSTITUTIONALITY OF STATE STAMP ACT—see CONSTITUTION, 5.

STATE.

CONSTRUCTION OF STATUTES RELATING TO INDEBTEDNESS FOR STATE CAPITOL
—see CAPITOL.

QUALIFIED PROPERTY OF STATE IN "SPECIAL DEPOSITS" IN STATE TREASURY—see SPECIAL DEPOSITS.

STATE STAMP DUTIES—see STAMPS, *passim*.

LIABILITY OF STATE TREASURER'S SURETIES FOR SPECIAL DEPOSITS—see SURETIES, 2.

STATEMENT.

1. STATEMENT NOT SHOWING ALL THE EVIDENCE—FACTS ASSUMED. Where there was no showing that the statement contained all the evidence on any fact involved in the case: *Held*, that the appellate court was bound to conclude every essential fact sufficiently proved. *Bowker v. Goodwin*, 135.

2. CERTIFICATE OF JUDGE TO STATEMENT FOR NEW TRIAL. Where a district judge certified at the end of a statement "that the foregoing is the settled and engrossed statement on motion for new trial of the above entitled cause": *Held*, that though not a literal compliance with the statute, such certificate was a substantial compliance and sufficient. *Overman S. M. Co. v. America M. Co.*, 312.

NO INQUIRY AS TO SUFFICIENCY OF EVIDENCE WHEN STATEMENT DEFECTIVE
—see APPEAL, 3.

SENDING BACK STATEMENT FOR CORRECTION—see APPEAL, 6.

STATEMENT ON APPEAL FROM RULINGS—see APPEAL, 8.

INSUFFICIENCY OF EVIDENCE TO BE SPECIFIED—see APPEAL, 10.

APPEAL—TRANSCRIPT WITHOUT STATEMENT—see APPEAL, 14.

FINDINGS MUST BE TAKEN UP BY STATEMENT—see FINDINGS, 1.

STATUTES.

1. REPEAL OF STATUTE BY REVISION OF SUBJECT MATTER. A new statute, revising the whole subject matter of a former law, repeals it, though containing no express words to that effect. *Thorpe v. Schooling*, 15.

2. LEFFINGWELL RELIEF ACT UNCONSTITUTIONAL. The act of February 16th, 1871, directing the issuance and payment of county warrants for the relief of James Leffingwell, (Stats. 1871, 57) is a special law regulating county business, and

therefore in violation of Art. IV, Sec. 20, of the constitution. *Williams v. Bidleman*, 68.

3. **CONSTITUTIONALITY OF STATUTE CONCERNING HENRY STICKNOTH'S WILL.** Where, under the act of March 4th, 1871, (Stats. 1871, 129) the unattested paper therein referred to was admitted to probate as the will of Henry Sticknoth, deceased: *Held*, that such statute was not unconstitutional, and such admission to probate not error. *Matter of Estate of Henry Sticknoth*, 223.
4. **STATUTE VALIDATING UNATTESTED WILL.** The passage of a statute, which validates a will by dispensing with the requirement of attesting witnesses, is not the exercise of judicial power; and such a statute is not for any such reason unconstitutional. *Matter of Estate of Henry Sticknoth*, 223.
5. **THE LATEST EXPRESSION OF LEGISLATIVE WILL, THE LAW.** Section 1 of the act of 1871, (Stats. 1871, 56) requiring the auditor to draw his warrant upon the treasurer for jurors' fees upon the certificate of the clerk of the court showing the amount due, conflicts, with evident intention, with sections 9, 10 11 and 12 of the act concerning county commissioners, (Stats. 1864-5, 259); and being the subsequent expression of legislative will, it overrides them to the extent of creating an exception, in favor of jurors, to the general rules requiring claims against counties to be audited as therein prescribed. *Gillette v. Sharp*, 245.

LAKE'S TOLL BRIDGE FRANCHISE OVER TRUCKEE RIVER—see **BRIDGE**, 1.

CONSTRUCTION OF STATUTES RELATING TO INDEBTEDNESS FOR STATE CAPITOL—see **CAPITOL**.

ADOPTION OF THE TERRITORIAL STATUTE ADOPTING THE COMMON LAW—see **COMMON LAW**.

SPECIAL STATUTE FOR REMOVAL OF COUNTY SEAT—see **CONSTITUTION**, 1.

SPECIAL STATUTE AUDITING AND ALLOWING CLAIM AGAINST COUNTY WHEN UNCONSTITUTIONAL—see **CONSTITUTION**, 3.

LOCAL MANAGEMENT OF LOCAL AFFAIRS—see **CONSTITUTION**, 4.

CONSTITUTIONALITY OF STATE STAMP ACT—see **CONSTITUTION**, 5

STATUTE WAIVING ESCHEAT NOT UNCONSTITUTIONAL—see **CONSTITUTION**, 7

PRINCIPLES OF STATUTORY CONSTRUCTION—see **CONSTRUCTION**, 1, 2, 3, 5, 6

CONSTRUCTION OF STATUTE RELATING TO SUPPLEMENTAL ASSESSMENTS—see **CONSTRUCTION**, 11.

LAWS IN REFERENCE TO COUNTY LIABILITIES—see **COUNTIES**, 2.

STATUTORY POWER OF COUNTY COMMISSIONERS TO EMPLOY ATTORNEYS—see COUNTY COMMISSIONERS, 1.

STATUTE ALLOWING DEPOSITIONS IN CERTAIN CRIMINAL CASES—see CRIMINAL LAW, 15.

REGISTRY LAW ALLEGIANCE OATH UNCONSTITUTIONAL—see ELECTIONS, 1.

STATUTE PREVENTING ESCHEAT NO TRANSFER FROM SCHOOL FUND—see ESCHEAT, 1.

STATUTE MAKING PARTIES WITNESSES DOES NOT CHANGE RULES OF EVIDENCE—see EVIDENCE, 2.

STATUTE FIXING TIME TO PRESENT CLAIMS FOR STATE CAPITOL INDEBTEDNESS—see EXAMINERS, 2.

PEREMPTORY STATUTE FOR PAYMENT OF JURORS' FEES BY COUNTIES—see FEES.

STATUTE LICENSING GAMING ONLY PROTECTS FROM CRIMINAL PROSECUTION—see GAMING, 2.

STATUTE ALLOWING GOLD COIN JUDGMENT IN TRESPASS CASE—see GOLD COIN.

STATUTE AS TO DEMURRER TO INDICTMENT—see INDICTMENT, 1.

JUDICIAL INQUIRY AS TO SPECIAL AND LOCAL LEGISLATION—see JURISDICTION, 1.

STATUTE FOR LOCATION OF UNLOCATED LAND WARRANTS—see LAND, 3.

APPLICATION OF STATUTE REGULATING COUNTY BUSINESS—see LEGISLATURE, 3.

PRESUMPTION WHERE BOTH GENERAL AND SPECIAL STATUTE AS TO REMOVING A COUNTY SEAT—see PRESUMPTIONS, 1.

REPEAL OF STAMP DUTY SCHEDULE OF 1866—see TAXES, 1.

LIMITATION OF TIME IN STATUTE TO PRESENT CLAIMS—MATERIALITY—see TIME.

STAY OF EXECUTION.

STAY OF EXECUTION ON APPEAL FROM JUSTICE—see JUSTICE OF THE PEACE.

SUFFRAGE.

(See ELECTIONS.)

SUMMONS.

AFFIDAVIT TO TAKE DEPOSITIONS NEED NOT SHOW SERVICE OF SUMMONS—see DEPOSITIONS.

SURETIES.

1. ARE ADMINISTRATORS' SURETIES BOUND BY DECREE OF SETTLEMENT? Whether or not a decree of settlement and distribution is conclusive or even prima facie evidence of anything more than the fact of its rendition; it is to be observed that the bond required by our statute differs from that in use in states where such sureties are held bound. *McNabb v. Wizom*, 163.
2. LIABILITY OF STATE TREASURER'S SURETIES FOR "SPECIAL DEPOSITS." All special deposits paid into the state treasury under the provisions of the Act of 1867, for the conditional purchase of state lands, (Stats. 1867, 166, sec. 5) are received by the State Treasurer in his official capacity; and the sureties on his official bond are liable therefor, as for other moneys. *State v. Rhoades*, 434.

MEASURE OF DAMAGES AGAINST SURETIES FOR LOSS BY NEGLECT OF ADMINISTRATOR—see DAMAGES, 2.

ACTION AGAINST STATE TREASURER'S SURETIES FOR SPECIAL DEPOSITS—MEASURE OF DAMAGES—see DAMAGES, 4.

LIABILITY OF SURETIES OF ADMINISTRATOR—see EXECUTORS AND ADMINISTRATORS, 1, 2, 4, 6.

SURPLUSAGE.

INDICTMENT FOR MURDER—DEMURRER—SURPLUSAGE—see MURDER, 2.

TAILINGS.

TAILINGS REMOVED FROM LAND IN POSSESSION OF ANOTHER. Where a plaintiff was found to have the possession of certain land upon which tailings were deposited, and defendant to have intruded and removed a portion of such tailings: *Held*, that plaintiff's right to the tailings was coëxtensive with his right to the land. *Rogers v. Cooney*, 213.

"TAILINGS" CLAIMS ANALOGOUS TO MINING CLAIMS—see MINES, 1.

POSSESSION OF LAND VALUABLE ONLY FOR TAILINGS—see POSSESSION, 1.

TAXES.

1. REPEAL OF STAMP DUTY SCHEDULE OF 1866. The schedule of stamp duties contained in the act of 1866, (Stats. 1866, 177) was entirely repealed by the operation of the new act of 1871, (Stats. 1871, 142) though not expressly referred to therein. *Thorpe v. Schooling*, 15.
2. NO EQUALIZATION OF ASSESSMENT WHERE NO LEGAL STATEMENT FURNISHED. Where the Central Pacific Railroad Company failed to furnish a proper state-

ment of its taxable property within the time prescribed by law, and in default thereof the assessor placed a valuation thereon which the board of equalization afterwards reduced: *Held*, that the action of the board was unauthorized and should be annulled. *State ex rel. Thompson v. Board of Equalization of Washoe County*, 83.

3. **REVENUE LAWS—FAILURE OF RAILROAD TO FURNISH STATEMENT.** The statute imposing a penalty upon railroads for failing without legal excuse to furnish to the assessor on demand a statement of their taxable property, (Stats. 1869, 184) does not confer a discretion upon the board of equalization to determine whether there is a legal excuse or not, nor authorize equalization when no such statement is furnished. *State ex rel. Thompson v. Board of Equalization of Washoe County*, 83.
4. **TAX SCIT—FRAUD IN ASSESSMENT AS MATTER OF DEFENSE.** Where, in a suit against the Central Pacific Railroad Company to recover taxes under an assessment made in the absence of a legal statement, defendant set up in answer that the assessment was made by the assessor, fraudulently and contrary to his official judgment, at a sum nearly three times greater than the fair value of the property: *Held*, that such answer stated good matter of defense and was not demurrable. *State v. Central Pacific Railroad Company*, 99.
5. **FAILURE TO FURNISH STATEMENT—EXORBITANT VALUATION.** The fact that a taxpayer fails to make a statement as required by law, does not authorize the assessor to impose a valuation which he knows to be exorbitant and unjust. *State v. Central Pacific Railroad Company*, 99.
6. **PROPERTY IN TRANSIT THROUGH A COUNTY NOT PROPERLY IN IT FOR TAXATION PURPOSES.** Where wood cut in California and belonging to a citizen of that state was thrown into the Carson river and simply passed through Douglas County to find a market in Ormsby County, for which it was destined: *Held*, that in so passing through Douglas County it was not properly in it for the purposes of taxation. *Conley v. Chedie*, 336.
7. **WHAT PERSONAL "PROPERTY IN COUNTY" IS PROPERLY ASSESSABLE THEREIN.** To constitute goods properly in a particular county, so as to make it legally assessable therein within the meaning of the revenue laws, it must be in such a situation as to make it a part of the wealth of that county; it must belong in it and be incorporated with the other property of the county. *Conley v. Chedie*, 336.
8. **SESSIONS AND TIME FOR EQUALIZING OR DISCHARGING SUPPLEMENTAL ASSESSMENTS.** Under the statute relating to supplemental assessments, (Stats. 1867, 111) action may be taken by the board of county commissioners to modify, equalize or discharge such assessments, irrespective of the particular character of session of the board; nor is there any limitation imposed by the statute as to the time of application. *State ex rel. Mason v. Ormsby County Commissioners*, 392.

9. DISCHARGE OF SUPPLEMENTAL ASSESSMENT AFTER REFUSAL TO EQUALIZE. Where an application was made to the board of county commissioners to equalize a supplemental assessment under the act of 1867, (Stats. 1867, 111) which was denied; and afterward an application was made to discharge the same assessment: *Held*, that the board had not exhausted its power in reference to the assessment by its action on the application to equalize. *State ex rel. Mason v. Ormsby County Commissioners*, 392.

CONSTITUTIONALITY OF STATE STAMP ACT—see CONSTITUTION, 5.

CONSTRUCTION OF STATUTE RELATING TO SUPPLEMENTAL ASSESSMENTS — see CONSTRUCTION, 11.

DISTINCTION BETWEEN “EQUALIZING” AND “DISCHARGING” AN ASSESSMENT —see DEFINITIONS, 3.

“LEGAL EXCUSE” OF RAILROAD TO FURNISH STATEMENT TO ASSESSOR—see RAILROADS, 1.

NO STATE STAMPS ON BANK CHECKS—see STAMPS, 2.

STATE REVENUE STAMPS ON FOREIGN BILLS—see STAMPS, 4.

TENDER.

1. PLEA OF TENDER OF SMALLER SUM NOT AN ADMISSION. Where, in an action by attorneys against a county, to recover \$5,000 for services performed for it under an unauthorized contract made by the district attorney, defendant denied any employment, and also pleaded that the services were worth only \$400, which it tendered and brought into court: *Held*, that, though under the old common law practice, such plea of tender might have carried with it an implied admission of the employment, it was not so under the practice act, which allows a defendant to plead as many defenses as he may have, and provides that all the allegations of a pleading shall be liberally construed, with a view to substantial justice. *Clarke v. Lyon County*, 75.
2. TENDER OF SMALLER SUM NOT AN ADMISSION OF INDEBTEDNESS. A tender of a smaller sum than that claimed is not a necessary admission that any sum is legally due. *Clarke v. Lyon County*, 75.

TIME.

LIMITATION OF TIME TO PRESENT CLAIMS—PRESUMPTION OF MATERIALITY. Where a special act in relation to the presentation of certain claims, otherwise not allowable, required them to be presented within thirty days, (Stats. 1871, 154) and therefore made a distinction between such claims and ordinary ones as to the time of presentment: *Held*, that the presumption was, that such limitation as to time was material and necessary to be followed. *Corbett v. Bradley*, 106.

TIME TO PRESENT CLAIMS AGAINST CAVANAUGH FOR STATE CAPITOL INDEBTEDNESS—see EXAMINERS, 2.

TIME WITHIN WHICH ADMINISTRATORS TO ACCOUNT AND SETTLE—see EXECUTORS AND ADMINISTRATORS, 3.

IMMATERIAL AVERMENTS AS TO TIME OF ACTS DONE—see PLEADING, 7.

ALLOWANCE OF ANSWER AFTER TIME—see PRACTICE, 6.

TIME FOR EQUALIZING OR DISCHARGING SUPPLEMENTAL ASSESSMENTS—see TAXES, 8.

TOLLS.

LAKE'S TOLL BRIDGE FRANCHISE OVER TRUCKEE RIVER—see BRIDGE, 1.

RIGHT TO TOLLS ON TOLL ROADS AND BRIDGES—see BRIDGE, 2.

RAILROAD BRIDGE NO INFRINGEMENT OF TOLL BRIDGE—see RAILROADS, 2, 4.

TRANSCRIPT.

RECORD ON APPEAL MUST SHOW ACTION APPEALED FROM—see APPEAL, 1.

NO INQUIRY AS TO INSUFFICIENCY OF EVIDENCE WHERE RECORD DEFECTIVE—see APPEAL, 3.

ARGUMENTS ON APPEAL OUTSIDE OF RECORD—see APPEAL, 12.

APPEAL—TRANSCRIPT WITHOUT STATEMENT—see APPEAL, 14.

DEFAULT TO BE AVAILABLE MUST BE SHOWN BY RECORD—see DEFAULT.

TRANSFER.

1. **TRANSFER TO FEDERAL COURT AFTER SUBMISSION TO STATE JURISDICTION.** The fact that a citizen of another state has submitted to the jurisdiction of a state court a suit against a citizen of this state, does not prevent him from insisting upon a transfer of his case to the United States circuit court, in accordance with the act of congress of March 2d, 1867. *Meadow Valley Mining Co. v. Dodds*, 143.
2. **AFFIDAVIT FOR TRANSFER OF CAUSE TO UNITED STATES CIRCUIT COURT.** The affidavit provided for by the act of congress of March 2d, 1867, to authorize the transfer of a case from a state court to the United States circuit court, requires a statement by the party that he has reason to, and does, believe that from prejudice or local influence he will not be able to obtain justice in the state court; but it does not require any showing of the existence of such

prejudice or local influence, or any statement of facts upon which he founds his belief. *Meadow Valley Mining Co. v. Dodds*, 143.

TREASURER OF STATE.

STATE TREASURER'S BOND—MONEY RECEIVED DURING FORMER TERM—PRESUMPTIONS—see BOND.

LIABILITY OF STATE TREASURER'S SURETIES FOR SPECIAL DEPOSITS—see SURETIES, 2.

TRESPASS.

ONLY POSSESSION REQUISITE TO MAINTAIN TRESPASS. In an action of trespass upon land, it is only necessary for the plaintiff to prove a rightful possession in himself; it is not incumbent on him to establish any title beyond that. *Rogers v. Cooney*, 213.

GOLD COIN JUDGMENT IN TRESPASS CASE—see GOLD COIN.

REMOVAL AFTER PATENT OF FIXTURES ERECTED ON PUBLIC LAND—TRESPASS—see PATENT, 1.

UNITED STATES.

1. ABSOLUTE OWNERSHIP BY UNITED STATES OF PUBLIC LAND AND WATER—PATENTS. The United States has an absolute and perfect title to, and the unqualified right of property in, the public land; and, as running water is an incident to or part of the soil over which it naturally flows, a patent carries not only the land but the stream naturally flowing through it, and the same right to its use or to recover for a diversion of it, as the United States or any other absolute owner could have. *Vansickle v. Haines*, 249.
2. CONGRESSIONAL LEGISLATION AS TO DIVERSION OF WATER ON PUBLIC LAND. It appears from the act of congress of July, 1866, which seems to have been adopted simply to protect those who at that time were diverting water from its natural channels on the public land, that no diversion had previously been authorized. *Vansickle v. Haines*, 249.

AMENDMENT VI OF U. S. CONSTITUTION NOT APPLICABLE TO STATE TRIBUNALS—see CONSTITUTION, 12.

CONSTRUCTION OF GRANTS OF GOVERNMENT—see CONSTRUCTION, 9.

JURISDICTION OF U. S. COURTS IN SUITS BETWEEN CITIZENS OF DIFFERENT STATES—see JURISDICTION, 2.

EFFECT OF UTAH TERRITORIAL LEGISLATION ON U. S. LAND—see LAND, 4.

STATE REVENUE STAMPS ON FOREIGN BILLS—see STAMPS, 4.

TRANSFER TO FEDERAL COURT AFTER SUBMISSION TO STATE JURISDICTION
—see TRANSFER, 1, 2.

USER.

ADVERSE USER OF WATER ON PUBLIC LAND CANNOT BE SET UP AGAINST
PATENTEE—see ADVERSE HOLDING.

USE OF WATER PERCOLATING INTO ONE'S OWN SOIL NOT ACTIONABLE—see
WATER RIGHTS, 5.

UTAH.

1. UTAH LAWS AS TO DIVERSION OF WATER. The law of Utah Territory respecting the grant of water rights, (Com. Laws Utah, 12, Sec. 38) purported to authorize the county court to grant a right to divert water, but did not purport to authorize any individual to make such diversion without the sanction of the court. *Vansickle v. Haines*, 249.
2. UTAH LAW AS TO INFRINGEMENT OF WATER RIGHT. The law of Utah Territory respecting infringements upon water rights, (Com. Laws Utah, 155, Sec. 7) granted no right of any kind to divert water, but simply provided a punishment for the violation of rights supposed already to exist. *Vansickle v. Haines*, 249.
3. UTAH TERRITORY COULD NOT CONFER RIGHTS TO WATER ON PUBLIC LAND. Under the act of congress organizing the territory of Utah, which provided that the territorial legislature should pass no law interfering with the primary disposal of the soil, no act of the legislature would have been valid that in any way attempted to confer any right to the water of the streams on the public lands. *Vansickle v. Haines*, 249.

UTAH FRANCHISE TO LAKE'S TOLL BRIDGE OVER TRUCKEE RIVER — see
BRIDGE, 1.

VACATION.

ORDERS MADE IN VACATION NOT VALID TILL DELIVERED FOR FILING—see
ORDER, 2.

VARIANCE.

IMMATERIAL VARIANCE BETWEEN PROOFS AND ALLEGATIONS. Where in an action for diverting the water of a certain creek, plaintiff alleged in his complaint that in June, 1865, and before the alleged diversion, he and one Epstein recorded a claim to all the waters of the creek, and within a reasonable time afterwards constructed a flume leading the waters to his land, and that he had acquired all the interest of Epstein; and on the trial plaintiff testified that he

and one Jones constructed the flume in 1864, and in 1865 he and Epstein recorded the claim; and a motion by defendant to strike out the testimony on the ground that it did not conform to the allegations of the complaint was denied: *Held*, that there was no fatal variance, and that the ruling was not error. *James v. Goodenough*, 324.

VENUE.

GENERAL INTEREST OF PEOPLE OF COUNTY IN QUESTION INVOLVED NO GROUND FOR CHANGE OF VENUE. It is no ground for a change of venue that the people of the county, in which the action is to be tried, are generally interested in the question involved. *Conley v. Chedic*, 336.

VERDICT.

CRIMINAL LAW—VERDICT WITH RECOMMENDATION TO FULL EXTENT OF PUNISHMENT—see CRIMINAL LAW, 1.

WRITTEN FINDINGS BY JURY TO BE PROPERLY ASKED FOR—see JURY, 2.

WAIVER.

GROUND OF NONSUIT WAIVED IF NOT URGED AT PROPER TIME—see NON-SUIT, 2.

STATUTE WAIVING ESCHEAT NOT REGULATION OF PRACTICE—see PRACTICE, 5.

WARRANTS.

LAND WARRANTS—see LAND, 1, 2, 3.

WARRANTY.

DESCRIPTION OF BUILDING IN INSURANCE POLICY NOT A WARRANTY—see INSURANCE, 4.

AGREEMENT IN INSURANCE CONTRACT AS TO WHAT SHALL BE A WARRANTY—see INSURANCE, 8.

WASHOE COUNTY.

WASHOE COUNTY SEAT ACT CONSTITUTIONAL. The act of February 17th, 1871, fixing the county seat of Washoe County at Reno, (Stats. 1871, 59) is not obnoxious to the constitutional provision against special and local legislation. (Art. IV, Sec. 21.) *Hess v. Pegg*, 23.

WATER RIGHTS.

1. **DIVERSION OF WATER ON PUBLIC LAND CONFERS NO RIGHT AGAINST GOVERNMENT.** Where a person diverted and appropriated the waters of a creek on public land from its natural channel; and afterwards the land, on which its natural channel was situated, was patented to another: *Held*, that the former acquired no right against the government; and that the patent carried all the right of the government, which was absolute and unincumbered by any diversion or appropriation, to the patentee. *Vansickle v. Haines*, 249.
2. **RIGHT TO NATURAL FLOW OF WATER NOT AFFECTED BY QUESTION OF USE.** The right of the owner of the soil to the natural flow of a stream of water through his land, is not affected by the question as to what use he will put it to. *Vansickle v. Haines*, 249.
3. **RIGHT OF LAND OWNER TO NATURAL FLOW OF WATER THROUGH IT.** The owner of land over which a stream of water naturally flows, has a right to the benefits which the stream affords, independently of any particular use; that is, he has an absolute and complete right to the flow of the water in its natural channel, and the right to make such use of the water, when he chooses, as will not damage others located on the same stream and entitled to equal rights with himself. *Vansickle v. Haines*, 249.
4. **RIGHTS OF RIPARIAN PROPRIETORS ON NON-NAVIGABLE STREAMS.** The common law rule as to running water allows all riparian proprietors to use it in any manner not incompatible with the rights of others; so that no one can absolutely divert all the water of a stream, but must use it in such a manner as not to injure those below him. *Vansickle v. Haines*, 249.
5. **USE OF WATER PERCOLATING INTO ONE'S OWN SOIL NOT ACTIONABLE.** Where plaintiffs appropriated, possessed and used a spring of running water upon land which they occupied; and defendants dug a well upon adjoining land occupied by them; and the spring dried up after the digging of the well, but there was no visible connection between the well and the spring—the flow of water into defendants' land being by percolation: *Held*, that plaintiffs had no cause of action against defendants for damages or for an injunction. *Mosier v. Caldwell*, 363.
6. **RIGHT OF OWNER OF LAND TO DIG FOR WATER IN IT.** A person may lawfully dig a well upon his own land, though thereby he destroy the subterranean, undefined sources of his neighbor's spring. *Mosier v. Caldwell*, 363.
7. **PERCOLATING WATER A PART OF THE SOIL.** Water percolating through the soil is not, and cannot be, distinguished from the soil itself; and of such water, the proprietor of the soil has the free and absolute use, so that he does not directly invade that of his neighbor, or, consequently, injure his perceptible and clearly defined rights. *Mosier v. Caldwell*, 363.

ADVERSE USER OF WATER ON PUBLIC LAND CANNOT BE SET UP AGAINST PATENTEE—see ADVERSE HOLDING.

PREÉMPTIONER ON ONE QUARTER-SECTION HAS NO RIGHT TO DIVERT WATER FROM ANOTHER—see LAND, 5.

RIGHT OF PATENTEE TO HAVE DIVERTED WATER RETURNED TO NATURAL CHANNEL—see PATENT, 3.

MULTIFARIOUSNESS OF COMPLAINT IN WATER RIGHT ACTION—see PLEADING, 5.

PRESUMPTIONS RESPECTING ADVERSE USER OF WATER SAME AS OF LAND—see PRESUMPTIONS, 6.

CONGRESSIONAL LEGISLATION AS TO DIVERSION OF WATER ON PUBLIC LAND—see UNITED STATES, 2.

UTAH LAWS AS TO DIVERSION OF WATER ON PUBLIC LAND—see UTAH, 1, 2, 3.

WILL.

1. OBJECT OF ATTESTING WITNESSES TO WILL. Attesting witnesses to a will are not required for the purpose of protecting the contingent and possible right of property in the state by way of escheat; but to prevent the setting up of fictitious wills against heirs and representatives. *Matter of Estate of Henry Sticknoth*, 223.
2. OBJECTION OF WANT OF SEAL TO WILL. Where it was urged in the Supreme Court for the first time that a will, admitted to probate in the court below, was invalid for want of a seal; and the record did not purport to contain a copy of the original will or a fac-simile thereof, but only a translation: *Held*, that the objection could not be successfully urged. *Matter of Estate of Henry Sticknoth*, 223.
3. SEAL TO WILL NEED NOT BE MENTIONED, NOR REMAIN. Though the statute contains an absurd and novel requirement that a will shall be sealed, (Stats. 1862, 58, Sec. 3) it is unnecessary to make mention of the seal in the instrument; nor is it necessary, if by the act of sealing the condition imposed by the statute is performed, that the seal should remain. *Matter of Estate of Henry Sticknoth*, 223.

CONSTITUTIONALITY OF STATUTE VALIDATING STICKNOTH'S WILL—see STATUTES, 3, 4.

WITNESS.

AFFIDAVIT FOR CONTINUANCE IN CRIMINAL CASE FOR ABSENCE OF WITNESS—see CONTINUANCE.

CUSTOM—INSUFFICIENCY OF PROOF—see CUSTOM.

EVIDENCE OF SUBSCRIBING WITNESS—see EVIDENCE, 1, 3.

MAKING PARTIES WITNESSES DOES NOT CHANGE RULES OF EVIDENCE—see EVIDENCE, 2.

TESTIMONY ON FORMER TRIAL OF ABSENT WITNESS NOT ADMISSIBLE—see EVIDENCE, 5.

OBJECT OF ATTESTING WITNESSES TO WILL—see WILL, 1.

